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REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

SUBMITTED AT THE AUGUST TERM, 1894, OF THE FOURTH DISTRICT; AND
THE OCTOBER TERM, 1894, AND THE MARCH TERM,
1895, OF THE FIRST DISTRICT.

VOL. LVIII.

REPORTED BY
MARTIN L. NEWELL
OF THE SPRINGFIELD BAR

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These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

MARTIN L. NEWELL, Reporter, Springfield, Illinois.

FIRST DISTRICT.

Composed of the county of Cook.
Court sits at Chicago on the first Tuesdays of March and October.
CLERK—Thomas G. McElligott, Ashland Block.

JUSTICES.

JOSEPH E. GARY, Ashland Block, Chicago.
ARBA N. WATERMAN, “ “ “
HENRY M. SHEPARD, “ “ “

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court,
except Cook county.
Court sits at Ottawa, LaSalle county, on the third Tuesday in May,
and the first Tuesday in December.
CLERK—Columbus C. Duffy, Ottawa, LaSalle county.

JUSTICES.

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Composed of the Central Grand Division of the Supreme Court.
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ALFRED SAMPLE, Paxton, Ford county.
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CASES
IN THE
APPELLATE COURTS OF ILLINOIS

FOURTH DISTRICT—AUGUST TERM, 1894.

**Benner Livery and Undertaking Company v. Lizzie
Busson.**

1. **CARRIERS OF PASSENGERS—*Carelessness of Employees.***—The fact that the driver of a team of horses, hitched to a carriage in which persons were riding, stopped near a mill, from which the noise of escaping steam or of a steam whistle might frighten the horses, and failed to retain possession of the lines or to adopt any means to control them or prevent them from running away while he was engaged in closing the windows in the carriage, furnishes reasonable grounds to justify a jury in finding that he was careless and incompetent and of culpable negligence.

2. **SAME—*Liverymen—Safe Drivers.***—It is the duty of a liveryman, as a carrier of passengers, to furnish drivers for his vehicles, competent, skillful and careful, and to use that care, vigilance and foresight under the circumstances and in view of the service undertaken and the mode of conveyance adopted, as will reasonably guard against and prevent accidents and consequent injuries to passengers, and slight neglect or want of care in this regard creates a liability to respond in damages for injuries thereby occasioned.

3. **SAME—*Gratuitous Passengers.***—The fact that a person is a gratuitous passenger, if received and accepted by the driver of a carriage as the proprietor's agent, to be carried as a passenger, does not relieve such proprietor of his duty as a carrier of passengers nor defeat the right of the passenger to maintain an action for negligence.

4. **NEGLIGENCE—*Jumping from a Carriage.***—The question as to whether a passenger in a carriage is guilty of contributory negligence in jumping therefrom, is one for the determination of a jury from the circumstances surrounding the act.

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5. *SAME—In Case of Sudden Danger.*—In cases of sudden and impending danger resulting from the negligence of another, the law does not require a delay in the efforts to escape until the exact nature and measure of the danger is ascertained.

Action for Personal Injuries.—Appeal from the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Submitted at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

STATEMENT OF THE CASE.

The first count of the amended declaration charges, in substance, that defendant furnished a very old, unskillful and negligent driver and horseman, to drive and take charge of the team attached to the carriage of defendant, in which plaintiff was riding as a passenger, and by reason of the unskillfulness, carelessness and negligence of said servant of defendant, the horses were permitted and caused to run away with the carriage, and plaintiff, while endeavoring to save herself from great injury and probable death, jumped from said carriage and was injured. In the second count, the negligence charged is, that said horses were not safe and gentle, but were wild and unsafe for driving, and by reason thereof took fright and ran away with said carriage, and thereby the injury resulted as averred in the first count. The jury found defendant guilty, and assessed plaintiff's damages at \$500, and judgment for that sum and costs was entered. Appellant contends the evidence failed to establish the negligence charged in either count of the declaration. That appellee was a gratuitous passenger, carried without compensation, and without the knowledge of defendant, and was guilty of such contributory negligence as would of itself bar her recovery. And that the errors of the court's rulings on instructions are cause for reversal.

The team, carriage and driver were hired of defendant by Bertsch to take his sick wife from East St. Louis to St. Louis, to consult a doctor, and this purpose was disclosed to defendant. Plaintiff was acquainted with and had em-

Benner Livery & Undertaking Co. v. Busson.

ployed this doctor, and was a next door neighbor of Mrs. Bertsch. For these reasons, and because she desired to have a lady with her, Mrs. Bertsch invited plaintiff to accompany her, which she did. The vehicle in which they and Bertsch were carried, was a close carriage with a door on each side and a window in each door. Shortly after starting, Mrs. Bertsch asked the driver to close a window. He stopped the team close to a steam planing mill, got down from his seat, without the lines, or any means to control the horses, closed the window in one door, went around to the other, and while attempting to close the window in it, the steam whistle in the planing mill was blown, the horses became frightened and started off at a rapid gait and plaintiff, alarmed at the sudden and impending danger of injury if she remained in the carriage, and to avoid it, as she believed, at once jumped out and received the injuries complained of. Appellee and Mrs. Bertsch agree as to the running away and gait, and speed, of the uncontrolled horses, but Bertsch testified they trotted off, not going very fast. It appears, however, they were going fast enough to frighten both appellee and Mrs. Bertsch, and the testimony of the latter that she couldn't jump out, that she was lame, justifies the inference that she, too, would have jumped out if she could, as being apparently less dangerous than remaining in the carriage, attached to a runaway team. Evidence was introduced by appellant showing that the driver was regarded as careful and competent and had many years' experience as a driver, and the team was gentle.

APPELLANT'S BRIEF, COCKRELL & MOYERS, ATTORNEYS.

Passenger carriers, not being insurers, are not responsible for accidents, where all reasonable skill and diligence have been employed. Story on Bailments (9th Ed.), Sec. 602.

A carrier of passengers is not responsible for accident or misfortune, any more than for the act of God, or the public enemy. *Sawyer v. Hannibal & St. Joe R. R. Co.*, 37 Mo. 240.

A servant of the company riding to his work, voluntarily

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and without payment of fare, is not a passenger. *Moss v. Johnson*, 22 Ill. 633.

The company is not liable where the ticket or pass was issued to another person and is non-transferable, the passenger passing himself off as the person named in the pass. *T. W. & W. Ry. Co. v. Beggs*, 85 Ill. 80; *T. W. & W. Ry. Co. v. Brooks*, 81 Ill. 292; *T. W. & W. Ry. Co. v. Brooks*, 81 Ill. 245; *C. & A. R. R. Co. v. Michie, Admr.*, 83 Ill. 427; *Boyce v. Anderson*, 2 Pet. (U. S.) 149.

APPELLEE'S BRIEF, A. FLANNIGAN AND M. MILLARD,
ATTORNEYS.

A person may leap out of a stage coach or hack to extricate himself from peril, if he does so without such "rashness as the circumstances would not reasonably excuse," and the proprietor is liable if his negligence was the proximate cause of the danger, real or apparent. *Frink et al. v. Patten*, 17 Ill. 406.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

We are of the opinion that the evidence establishes appellant's negligence, as averred in said first count, and the resulting injury to appellee as charged. Notwithstanding there was evidence tending to show the driver was careful and competent, yet the uncontradicted facts proven, that the driver stopped the team near a mill, from which the noise of escaping steam or of a steam whistle might frighten the horses, and failed to retain possession of the lines or adopt any means to control them or prevent them from running off while he was engaged in closing the windows, furnish reasonable grounds justifying the jury in finding that the driver was careless and incompetent, and guilty of culpable negligence. It was the duty of appellant, as a carrier of passengers, to furnish a driver competent, skillful and careful; *Tuller v. Talbot*, 23 Ill. 357; 2d Wait's Act. & Defen., pp. 63, 64, 65, 68, 69; and to use that care, vigilance and foresight under the circumstances, and in view of the service undertaken, and the mode of conveyance adopted, as

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would reasonably guard against and prevent accidents and consequent injury to passengers, and slight neglect or want of care in this regard, creates liability to respond in damages for the injuries thereby occasioned. Same authorities above cited and *Frink v. Potter*, 17 Ill. 410.

The second contention, that appellee was a gratuitous passenger and had no right of action, is untenable. She was received and accepted by the driver, defendant's agent, to be carried as a passenger, and defendant was paid. The fact that she paid nothing does not defeat her right of action. 2 *Wait's Ac. & Defen.*, 64 and 65. The alleged contributory negligence of defendant in jumping out of the carriage was a question for the jury to settle, and we do not feel at liberty, in view of the circumstances, to set aside their verdict upon the ground she was guilty of such contributory negligence as barred her right to recover. An instinctive effort to escape sudden impending danger, resulting from the negligence of another, does not relieve the latter from liability. The law does not require a delay in the efforts to escape until the exact nature and measure of the danger is ascertained. 2 *Wait's Act. & Defen.*, 75. *Frink v. Potter*, *supra*. Some of the instructions for the plaintiff were not strictly accurate, but all the instructions given, taken as a series, informed the jury correctly as to the law except that one given for defendant required plaintiff to prove every allegation of the declaration in order to recover. The court did not err in refusing to give the refused instructions or in modifying those modified. The judgment is affirmed.

**Terre Haute & Indianapolis R. R. Co. v. E. J. Eggmann,
Administrator of William Kennedy.**

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1. **RAILROAD COMPANIES—Negligent Construction of Track.**—It is negligence in a railroad company to construct its track at a street crossing, leaving a space between the planks and the rails so that the foot of an animal or human being may be hopelessly caught therein.

2. **DAMAGES—Ordinarily a Question for the Jury.**—The amount of

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damages to be recovered is a question of fact ordinarily to be settled by the jury.

3. **EXCESSIVE DAMAGES**—*When \$3,000 is Not.*—Where a boy, twelve years of age, able to earn fifty cents a day, is killed through the negligence of a railroad company, \$3,000 is not to be regarded as excessive damages.

4. **SPECIAL INTERROGATORIES**—*Must Relate to Ultimate Facts.*—Special interrogatories to be submitted to a jury, under the statute, must relate to the ultimate facts and not to mere evidentiary facts that tend more or less to establish the ultimate facts upon which the rights of the parties depend.

5. **ACTIONS FOR PERSONAL INJURIES, ETC.**—*Sufficiency of Proof.*—In actions for negligence resulting in the death of a person, it is sufficient, in order to entitle the plaintiff to recover, for him to prove enough of the allegations of his declaration to constitute the cause of action.

6. **PROOFS**—*Sufficient to Sustain the Action.*—Under a declaration alleging that the defendant failed to maintain a crossing so as to be safe to persons passing thereon as by the statutes of Illinois provided, but on the contrary, carelessly and negligently maintained it so that there were openings and holes therein so large as to allow the feet of pedestrians to be caught therein while passing over it, that the planks and material thereof were rotten, broken and insufficient to make said crossing safe for persons passing thereon, the evidence showed that the crossing, and the material thereof, were insufficient for the safety of the traveling public; that there were openings in the crossing so large that the foot of a pedestrian might be caught therein while passing over it. *Held*, to be proof of enough of the declaration upon this point to authorize a recovery.

Action for Damages.—Death from negligent act. Appeal from the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the August term, 1894. Affirmed. Opinion filed March 28, 1895.

APPELLANT'S BRIEF, THOS. J. GOLDEN AND TURNER & HOLDER,
ATTORNEYS.

One who runs with a view of crossing a track of a railroad company ahead of a locomotive moving thereon, and who, miscalculating the distance, is injured in the attempt, is guilty of such contributory negligence that he can not recover for his injury. *Chic. & A. R. R. Co. v. Fears*, 53 Ill. 115; *Chic. R. R. Co. v. Bell, Admr.*, 70 Ill. 108; *Bellefontaine v. Hunter*, 33 Ind. 335; *R. R. Co. v. Houston*,

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95 U. S. 697; Korrady v. Lake S. R. R. Co., 131 Ind. 261; Maryland v. Pittsburg & L. E. R. R. Co., 10 Am. St. R. 541; Aiken v. Penn. R. R. Co. (30 Penn.), 17 Am. St. R. 775; Liermann v. C., M. & St. P. Ry. Co. (82 Wis.), 33 Am. St. R. 37; Marden, Admr., v. B. & A. R. R. Co., 159 Mass. 393.

The proper measure of damages, in an action to recover for the death of a minor child, is the probable value of the services of the deceased, from the time of his death to the time he would have attained his majority, less the expense of his maintenance during the same time. *Tiffany, Death by Wrongful Act*, Sec. 164; *R., R. I. & St. L. R. R. Co. v. Delaney*, 82 Ill. 193; *Leahy v. Davis (Mo.)*, 25 S. W. Rep. 941.

APPELLEE'S BRIEF, JESSE M. FREELS AND A. R. TAYLOR,
ATTORNEYS.

Special interrogatories to be submitted to a jury, under the statute, must relate to the ultimate facts, and not to mere evidentiary facts that tend, more or less, to establish the ultimate facts upon which the rights of the parties depend. *Lake Erie & W. R. Co. v. Moran*, 140 Ill. 121; *Terre Haute & I. R. Co. v. Voelker*, 129 Ill. 556.

In actions of tort, it is sufficient to support the declaration, and the plaintiff's right to recover, to prove enough of the declaration to constitute a cause of action. *Rock Island v. Creevely*, 126 Ill. 409; *C., B. & Q. R. Co. v. Warner*, 108 Ill. 539; *Weber Wagon Co. v. Kehl*, 139 Ill. 645.

The judgment awarded for \$3,000 is not excessive. *C., M. & St. P. Ry. Co. v. Wilson*, 35 Ill. App. 348; *City of Chicago v. Keefe*, 114 Ill. 229; *Railroad Co. v. Barron*, 5 Wall. 91; *C. & A. R. Co. v. Shannon*, 43 Ill. 346; *E. J. & E. Ry. Co. v. Raymond*, 148 Ill. 251; *L. & N. R. Co. v. Mary Connor, Admx.*, 9 Heisk. (Tenn.); *Galveston, H. & S. A. Ry. Co. v. Arispe*, 23 S. W. 930; *Texas & Pac. Ry. Co. v. Robertson*, 82 Texas, 663; *Bierhauer v. N. Y. C. & H. R. R. Co.*, 15 Hun 562, 564; *Harkins v. Pullman Pal. Car Co.*, 52 Fed. Rep. 723; *Bertha Zinc Co. v. Black's Admr.*, 88 Va. 304; *L. & N. R. Co. v. Shivell's Admr.*, 18 S. W. Rep. 946.

The statute commits the question as to the pecuniary in-

jury the plaintiff and next of kin have sustained by the death of the deceased, and the pecuniary compensation to be given therefor, to the jury, and this shall be what they "deem fair and just." Rev. Stat. Ill., Chap. 70, Sec. 2; I. C. R. Co. v. Simmons, 38 Ill. 242; City of Chicago v. Keefe, 114 Ill. 229; C. & A. R. Co. v. Shannon, 43 Ill. 346; Railroad Co. v. Barron, 5 Wall. 91.

The amount of damages, and whether excessive, is a question of fact for the jury. City of Salem v. Harvey, 129 Ill. 344; City of Joliet v. Weston, 123 Ill. 641.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

This was an action by appellee against appellant, to recover damages for the killing of William Kennedy, a lad twelve years of age, by one of appellant's trains. A verdict for \$4,250 was rendered in favor of appellee, who, at the suggestion of the trial court, entered a remittitur of \$1,250. The court thereupon rendered judgment for appellee for \$3,000, and from this judgment appellant has perfected an appeal to this court.

William Kennedy, with his brothers, Joseph and James, aged respectively ten and fourteen years, attended eight o'clock mass at St. Patrick's church in East St. Louis, on Sunday morning, March 5, 1893. In going to and returning from the church, the boys passed along Pennsylvania avenue which was crossed by appellant's roadway. The accident occurred at about nine or ten o'clock, at the intersection of the street and railroad track.

The space between the rails of appellant's main track at the road crossing was filled with oak planks three inches thick and sixteen feet long, with room enough between the rails and plank for the flange of the engine and car wheels. There was a conflict of the evidence as to the width of the space between the east rail and the adjacent plank. Appellee's witnesses, some of whom measured the space, fix it at from three and one-quarter to three and one-half inches. Appellant's witnesses say that the space was not more than

two and one-half inches. The evidence on both sides shows that a space of three inches or more at this point would be a negligent construction of the track. While the difference of one inch, as between two and one-half and three and one-half inches, seems very inconsiderable, yet when it is observed that this difference determines, in many cases, whether the foot of an animal or human being shall be hopelessly caught in this dangerous space, it is seen at once that the testimony upon this point is all-important on the question of the negligence of the railroad company. It is sufficient to say that the evidence justified the jury in finding that the space was more than three inches, and that the track was, therefore, even according to appellant's testimony, in a dangerous condition, and it is certainly immaterial in this case whether this dangerous condition of the track arose from an improper construction thereof originally, or from failure to repair and keep the track in a reasonably safe condition.

At the time of the accident, one of appellant's engines was backing toward this crossing from the south, pulling twenty-one freight cars, some of them loaded and some of them empty. As the tender approached the crossing, it was moving at the rate of one or two miles per hour. William Kennedy, who was in advance of his two brothers, as they were returning from church, attempted to cross the track, when his foot became caught in the space already described, between the plank and the east rail of the track. He endeavored to extricate his foot from this dangerous position, but was unable to do so. He cried aloud so as to be heard by one of his brothers. The engineer and fireman did not see him. In fact, the fireman was engaged in cleaning a window and the engineer was looking another way. The tender, which was in advance of the engine, ran over the boy, and the train was stopped while the tender was still upon him. The shoe upon the foot which was caught between the plank and the rail was broken from the boy's limb and pressed into the space so that a pick was used by one of the railroad men to remove it. The boy's limbs were horribly mangled and he died between twelve and one o'clock, in consequence of the injuries received.

It was insisted by appellant that the boys were in the railroad yards, five or six hundred feet south of the crossing, about fifteen minutes before the accident. The engineer, fireman and three switchmen so swear. Thence it is sought to draw an inference that the boys went up the track toward the crossing and were endeavoring to jump upon the tender, and that William Kennedy was hurt while engaged in this unlawful act. The only direct evidence upon this point, aside from that of the two boys, who swear that they were not endeavoring to jump upon the tender, is that of a woman produced by appellant as a witness, calling herself Mrs. Hamlin, who answers in such a manner as to discredit her testimony. She refuses repeatedly to tell where she was going when she claims to have seen William Kennedy trying to jump upon the tender. She admits that she has worn another name than that under which she appears as a witness, but refuses to give the name or to state how she came to wear it, or by what means her present cognomen became fixed upon her. A perusal of her testimony is sufficient to show that the jury were justified in rejecting it altogether.

Setting Mrs. Hamlin to one side, there is no difficulty in accepting the testimony of Joseph Kennedy, who was nearest to William at the time of the accident, as being substantially correct. His account of the accident is in accordance with the facts as hereinbefore stated. The engineer and fireman do not claim to know how the accident occurred. Thus it appears that the jury were justified in finding that William Kennedy, while in the exercise of reasonable care for his own safety, was killed by appellant's train because of the negligence of those in control of the train, and also because of the dangerous condition of appellant's track at the place where the injury was received. And so we hold that the verdict was not against the evidence.

It is said, however, that the damages are excessive. But the amount of damages to be recovered is a question of fact, and therefore a question ordinarily to be settled by the jury. *City of Joliet v. Weston*, 123 Ill. 641; *City of Salem v. Harvey*, 129 Ill. 244.

In *C. & A. R. R. Co. v. Shannon*, 43 Ill. 338, the Supreme Court say: "Such next of kin as have suffered pecuniary injury from the death of deceased, may recover pecuniary compensatory damages under this statute. How this pecuniary damage is to be measured, in other words, what is to be the amount of the verdict, must be largely left (within the limits of the statute) to the discretion of the jury. The legislature has used language which seems to recognize this difficulty of exact measurement and commits the question especially to the finding of the jury. The law provides that they are to give such damages as they shall deem a fair and just compensation."

In the *City of Chicago v. Keefe*, 114 Ill. 222, a judgment for \$2,500, for the death of a little boy was affirmed. In this case the Supreme Court say: "The question is, in its nature, incapable of exact determination, and the jury should, therefore, calculate the damages in reference to a reasonable expectation of benefit, as of right, or otherwise, from the continuance of his life. Parents, and even brothers and sisters, might reasonably expect, in many ways, to derive pecuniary benefit from the continued life of the intestate, as of grace and favor, if not of right, at any age of life, and our statute imposes the duty of support, in the event of their becoming paupers, of the parent by the child, and of one brother or sister by another brother or sister."

William Kennedy was a strong healthy boy, and had been earning fifty cents a day for a short time prior to his death. His funeral expenses amounted to \$150. Considering the discretion which the jury were authorized to exercise, we are not prepared to say that the judgment, which is large, is also excessive.

It is said that the court erred in giving appellee's instruction. In the argument of this proposition appellant divides the instruction into eight paragraphs, numbering them paragraph No. 2, paragraph No. 3, etc. An examination of the record shows that the several clauses of the instruction, as the same was given by the court, were not numbered in this manner, but that the whole of it was written together with

such connecting words as to indicate clearly to any reasonable being that the several clauses formed but a single instruction. The clauses were connected by such expressions as "and if the jury believe from the evidence," "and if the jury further find from the evidence," which show that each succeeding clause was added to what preceded it, so as to require a finding of the truth of the facts stated in all of the clauses before there could be a recovery.

There was but one marginal "Given," which clearly indicated the unity of the instruction. The fact that each clause began at the left of the sheet, somewhat after the manner of paragraphs, did not show that there were eight instructions rather than one. There is nothing in this criticism of the instruction, and no other specific objection has been insisted upon.

The trial court refused to submit to the jury, at the request of appellant, a special interrogatory, which is as follows: "Was the deceased passing over the crossing in the usual way and going directly across the same?" There was no error in this ruling of the court. *T. H. & I. R. R. Co. v. Voelker*, 129 Ill. 540. "The rule is that the special interrogatories to be submitted to a jury, under the statute, must relate to the ultimate facts, and not to mere evidentiary facts that tend, more or less, to establish the ultimate facts upon which the rights of the parties depend." *L. E. & W. R. R. Co. v. Morain*, 140 Ill. 117; *E. J. & E. Ry. Co. v. Raymond*, 148 Id. 241.

It is also urged that the evidence does not sustain the allegations of the declaration. The part of the declaration involved here is as follows: "Yet defendant failed to maintain said crossing so as to be safe to persons passing thereon, as by the Statute of Illinois provided, but on the contrary, carelessly and negligently maintained said crossing, so that there were openings and holes therein so large as to allow the feet of pedestrians to be caught therein while passing over said crossing, and said crossing and the plank and material thereof were *rotten, broken and insufficient* to make said crossing safe for persons passing thereon."

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It is said that the evidence fails to show that the planks of the crossing were rotten or broken. This constitutes the alleged variance between the proof and the declaration. In actions like the one at bar, it is sufficient, in order to entitle plaintiff to recover, for him to prove enough of the declaration to constitute the cause of action. *C., B. & Q. R. R. Co. v. Warner*, 108 Ill. 538; *Weber Wagon Co. v. Kehl*, 139 Ill. 644. So, in the case under consideration, if it had been proved that the planks were utterly rotten, it would not have been necessary to prove that they were in fact broken, or if it had been proved that they were broken, there would have been no variance even though rottenness of the planks had not been established. The evidence shows that the crossing and the material thereof were insufficient for the safety of the traveling public; that there were openings in the crossing so large that the foot of a pedestrian might be caught therein while passing over the crossing. This is proof of enough of the declaration upon this point to authorize a recovery.

We find no material error in the record. The judgment is affirmed.

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Isaac Osgood and Albert Osgood, Partners as I. Osgood & Son, v. William Groseclose and John C. Groseclose, Partners as Groseclose Brothers.

• 1. **BURDEN OF PROOF**—*Determined by the Pleadings.*—The burden of proof is determined by the pleadings. Whenever, whether in plea or replication, rejoinder or sur-rejoinder, an issue of fact is reached, then whether the party claiming the judgment of the court asserts an affirmative or negative proposition, he must make good his assertion; on him lies the burden of proof.

2. **SAME**—*Can Not be Shifted by the Defendant, When.*—A defendant can not, by setting up in his plea a contract different from that set up by the plaintiff, cast the burden of proof on the latter to show there was no such contract.

Assumpsit.—Appeal from the Circuit Court of Alexander County; the Hon. OLIVER A. HARKER, Judge, presiding. Declaration; common

counts; the pleas are stated in the opinion of the court; trial by jury; verdict for plaintiff; appeal by defendant. Submitted at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

BOYER & BUTLER, attorneys for appellants.

LANSDEN & LEEK, attorneys for appellees.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellees obtained a judgment for an alleged balance due them for lumber manufactured at their mill at Randall, Missouri. The contract of sale was verbal, about which there is no dispute except as to the inspection and amount of lumber sold. The appellees claim and so testified, that they were to have as good as St. Louis inspection, on which they had been selling, and on disagreement "the trade was to be at an end." One of the appellants testified the sale was on Chicago inspection, the other testified that from subsequent conversations he so understood the contract.

The appellants also claim they purchased all of the cut of the year 1892, which they did not receive by at least 150,000 feet. The appellees deny they sold any definite quantity of lumber. The lumber was to be delivered by appellees f. o. b. cars at Randall. The first delivery under the contract began about July, 1892, and continued to be delivered at various intervals, until in February, 1893, the appellees refused to deliver any more lumber, on account, as claimed, of the unjust inspection of appellants, which, it is said, made a difference in the price of from two to five dollars on the thousand feet. The trouble about the inspection began in September, 1892, and continued at various times until February, 1893. At this latter date, according to appellees' account, there was due from appellants the sum of \$973.49, and according to the latter's account \$975.55. The appellants claimed they were entitled to all the cut of the mill for 1892, and refused to pay appellees' claim unless they would agree to deliver all of the cut of that year. They were ready, and testify they so informed appellees, to then deliver

their check, which was good, for the balance, according to their account of \$975.55, if the appellees would then agree to deliver the cut of 1892 in the future. The parties disagreed, and hence this suit.

The declaration counts for lumber sold and delivered. It contains only the common counts. The defendants—appellants—plead the general issue and set-off. In the latter plea the claim is made that plaintiffs failed and refused to deliver a large amount of lumber under their contract, whereby defendants were greatly damaged, etc. The claim of appellants is this damage, on the basis of 150,000 feet not delivered, would amount to \$1,500.

It appears from the evidence that cash payments were not always made as agreed upon, but that on December 6, 1892, there was due appellees the sum of \$4,094, for which, on that date, appellants gave their two notes, one for \$2,094, due in thirty days, and one for \$2,000, due in sixty days after date, which were paid when due. At this time the appellees had sawed out for appellants a lot of wagon tongues, of the value of \$271.08, which had not been delivered, but were included in the \$4,094, for which the notes were given. It further appears that the tongues were still in the yard at the time the suit was brought and that no demand was ever made by appellants on appellees to load the same on the cars. Appellees were ready to do so at any time when requested.

It is evident that appellants directed where the cars were to be billed, and when appellees were to load them, although appellees ordered the cars. The Osgoods had the lumber shipped to different places, where they made sales, as we understand the evidence, which is very meagerly set out in the abstract.

The appellants rely upon erroneous instructions for the reversal of the judgment below.

The first error relied upon is that by appellees' third instruction, appellants were deprived of the right to credit the \$271.08, paid for wagon tongues not delivered. The effect of the instruction was that appellants were not entitled to this credit, unless the evidence showed the appellees had

converted the tongues. The tongues belonged to appellants, who could have had them on demand, and therefore they were not entitled to such credit. They evidently so understood when they tendered the check for \$975.55. The first and second instructions given for appellees, of which complaint is made, were to the effect, that if the jury believed from the evidence, the appellees were to have St. Louis inspection, and that on disagreement they could terminate the contract, then if the parties did in good faith disagree, they had the right to terminate the contract. There was evidence to sustain these instructions.

Complaint is also made of the fourth instruction, given for appellants. It was to the effect that the burden was on appellants to prove their plea of set-off. It alleged a purchase of all the cut of 1892, and the failure of appellees to deliver such cut, whereby appellants lost large profits on contracts made by them. The instruction is sustained by *Kelly v. Garrett*, 1 Gilm. 649, 652; *Laird v. Warren*, 92 Ill. 204.

The appellants were bound to prove their plea, which included the contract there set out. After such proof it would devolve on the appellees to show there was no such contract. *Robinson v. Parrish*, 52 Ill. 130. The burden of proof is determined by the pleadings. *Phelps v. Jenkins*, 4 Scam. 48. "Whenever, whether in plea or replication, or rejoinder or sur-rejoinder, an issue of fact is reached, then whether the party claiming the judgment of the court asserts an affirmative or negative proposition, he must make good his assertion. On him lies the burden of proof." 1 Wharton on Ev., Sec. 354. The jury were fully instructed that the plaintiffs must make out their case by the preponderance of the evidence. The defendants were required to do the same on the defense set up in the special plea. They could not, by setting up in their plea a contract different from that set up by plaintiffs, cast the burden of proof on the latter to show there was no such contract. *Robinson case, supra*, is in point.

The case was fairly tried on its merits, and the judgment is affirmed.

Valentine Densch v. Theophilus Scott.

1. **INJUNCTION**—*To Restrain a Tenant from Plowing up a Meadow.*—A bill for an injunction to restrain a tenant from plowing up a meadow will not be sustained where it appears that the complainant has an ample remedy at law.

2. **SAME**—*Costs on Dissolution—Solicitor's Fees.*—The design of the statute is to allow solicitor's fees for actual services performed in procuring the dissolution of the injunction and not for services done generally in the case.

3. **DAMAGES**—*Dissolution of Injunction.*—"Lost time at court and procuring witnesses," are not proper elements of damages to be allowed upon the dissolution of an injunction.

4. **SAME**—*What Are Not Proper.*—Where an injunction to restrain a tenant from plowing up a meadow on the demised premises was improperly issued, upon an application for damages on its dissolution, it was held that loss of profits for not being allowed to cultivate the land in corn, keeping an idle horse five months, and loss on sale of hogs, etc., were too remote and speculative.

Injunction.—Appeal from the Circuit Court of Cook County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Submitted at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

W. S. MORRIS, attorney for appellant.

ROSE & SLOAN, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Appellant exhibited his bill for injunction against appellee to the master in chancery of Pope county, alleging he is the owner of certain described lands conveyed to him by Ann Calkins, who had, prior to his purchase, leased it to appellee; that the lease is in force, and by its terms the lessee was to cultivate the land in a husband-like manner, but nevertheless said appellee has threatened to and has turned upon a certain meadow on said land a lot of hogs; that said hogs will, if again turned upon said land, destroy said meadow by rooting it up, which will cause damage to said farm lands of fifty dollars; that orator avers and verily be-

lieves defendant intends to destroy said meadow entirely by so turning his hogs upon the same or by plowing it up, and this will be so done by him, not because it is good husbandry so to do, but from a spirit of wantonness and spite against orator, who is without remedy except in a court of chancery. Prays for a writ of injunction enjoining defendant and all persons under him from destroying said meadow, or in any wise interfering with the same, except for the purpose of gathering the crops from the same. It is then next alleged that orator will be irreparably injured if he is required to give notice of this application for this injunction as defendant is now threatening to do said injury; asks that the writ be issued at once and for such other relief as to equity belongs. No answer is called for by the bill.

The master ordered the issuance of the writ as prayed for, and the same was issued and served February 13, 1892.

On March 7, 1892, appellee filed his answer, admitting that appellant is owner of the land, but subject to an unexpired lease to defendant, made by appellant's grantor before the conveyance, by the terms of which lease he was to cultivate said land in a good and husbandlike manner; that he turned hogs on the meadow situated on said land, and would do so again if not restrained by legal process, and that the hogs would root up said meadow, but not destroy it or damage said farm land; that he intends to destroy the so-called meadow by pasturage and by plowing it up, and avers that this would be good husbandry and not in violation of the terms of his lease; denies any intention to destroy said meadow in a spirit of wantonness and spite, as charged, and denies complainant is without remedy or is entitled to the relief as alleged; then sets up that said meadow is old and unproductive, has not been plowed for many years, is overgrown with weeds and briars, and the land would yield a larger rental to his landlord and remuneration to defendant by plowing and cultivating in corn, and that he has the right to pasture it and plow it; that as a part of the consideration for accepting the said lease, it was agreed between him and his lessor, that said meadow should be plowed up

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and other land sowed in grass, and that he is ready and willing to perform his part of the agreement; that when he was restrained he was preparing to plow it up for corn; sets up that he is damaged, by reason of its not being plowed, in the sum of \$75, and loss in yield of corn \$25, and by reason of being restrained from tearing up the meadow by pasturage he has already sustained \$25 damage in and about procuring other pasturage for his hogs and cattle; makes said lease a part of his answer, and prays that his answer be taken as a demurrer. Replication to answer filed May 6, 1892. On the 25th of April, 1892, a motion to dissolve the injunction was overruled. On May 5, 1893, the court, by its final decree, dissolved the injunction and dismissed the bill at cost of Scott, and he took an appeal to this court.

On May 6, 1893, appellee filed suggestion of damages, and on February 1, 1894, filed an amended suggestion of damages. Court refused to allow any of the damages suggested, after hearing evidence, and decreed that appellee, Densch, pay the costs made in or about the motion, and that execution issue therefor. From this order he appealed to this court. Both appeals to be heard together.

The lease from Ann Calkins, Scott's grantor, to Densch, was dated January 1, 1890, expired in three years, and the meadow in question, containing eight to ten acres, was a part of the demised premises. By its terms, appellee was to attend to the farm and cultivate the same in a good and husbandlike manner, and to leave the same in as good condition as when he entered, usual wear and tear, and damage by the elements excepted. The rent reserved was one-fourth, delivered, of the wheat, oats, corn and potatoes, and one-third of the hay.

We think the court did not err in decreeing the dissolution of the injunction and dismissal of the bill. The bill on its face presented no sufficient ground for equitable relief, but fixed a sum of money as the measure of all the damage which would result from destroying the meadow, and no reason is alleged why this sum could not be recovered and collected by a suit at law. Aside from this, however, the

court was warranted in finding the material allegations of the bill were not proven by a preponderance of the evidence. The only remaining question is, did the court err in disallowing Densch any of the damages claimed in his amended suggestion, as follows:

Solicitor's fees in defense of the injunction suit, \$50; loss in being prevented from cultivating the meadow in corn, \$300; keeping idle horse five months, \$20; loss by sale of hogs for want of corn, \$200; lost time at court and procuring witnesses, etc., \$50.

The court did not err in refusing to allow solicitor's fees. The design of the statute is to allow such fees for actual services performed to procure the dissolution of the injunction and not for attorney's fees for all that has been or may be done in the case, or for services securing dismissal of bill on final hearing. *Lambert et al. v. Alcorn*, 144 Ill. 329, 330; *Blair v. Reading*, 99 Ill. 600; *Elder et al. v. Sabin*, 66 Ill. 131; *Lerne v. Osgood*, 57 Ill. 346; *Collins v. St. Clair*, 51 Ill. 328.

The damages claimed for "loss in being prevented from cultivating meadow in corn," were also properly disallowed. The evidence was conflicting on the question whether or not the crop of hay raised on the meadow in 1892 was of greater net value than the net value of a crop of corn would have been, if planted that year on the same land. This conflict the court settled against Densch, and we can not say the evidence did not warrant the finding that the net proceeds of the hay raised that year, which Densch received, did not equal at least the net value of his share of a crop of corn, had it been planted that year on the same land; hence, he suffered no loss by being prevented from cultivating the meadow in corn, and this was a sufficient reason for disallowing said item; and, so holding, we deem it unnecessary to discuss the sufficiency of another reason urged, viz., that such damages are too remote and speculative, and of the same character held to be so in *Alexander v. Colcord*, 85 Ill. 326, and other cases cited. The items, "keeping idle horse five months," and "loss by sale of hogs for want of corn," were properly disallowed. "Lost time at court and

Campbell v. McGuire.

procuring witnesses" could not be allowed as an element of damages. *Collins v. St. Clair, supra*. The judgment and decree of the court, dissolving the injunction and dismissing the bill on final hearing, and decree disallowing any damages, are affirmed.

**Henry F. Campbell, as Treasurer of the Carbondale
Building and Loan Association v. Edward
McGuire, Assignee.**

1. **PARTNERSHIP—*Debts Due to Individual Partners.***—The individual members of a partnership can not prove a claim against the joint estate in competition with the creditors of the firm, and thereby take a part of the fund, to the prejudice of those who are not only creditors of the partnership, but of such members as well.

Claim in Probate.—Appeal from the County Court of Union County; the Hon. MONROE C. CRAWFORD, Judge, presiding. Submitted at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

. ISAAC CLEMENTS, attorney for appellant.

WM. W. CLEMENS and WM. A. SCHWARTZ, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Henry F. Campbell, claiming as treasurer of said loan association, on January 17, 1894, filed a claim of \$2,171.28 in said County Court, against the bankrupt estate of Richart & Campbell, of which firm Henry F. Campbell was a member. Exceptions to the claim were filed on behalf of several creditors, and a hearing was had. The court disallowed the claim and entered judgment against the claimant for costs.

It appears from the evidence that on August 22, 1893, the firm of Richart & Campbell, bankers, made an assignment for the benefit of their creditors, and then had in the bank \$2,171.28 belonging to said loan association, deposited by

Henry F. Campbell, its treasurer, and also a member of the firm, and it was for this debt the claim above mentioned was made. On September 5, 1893, Campbell ceased to be treasurer and E. F. Mitchell was appointed as his successor, and on that day the whole sum of \$2,171.28 was paid him, as such treasurer and successor of Campbell, by one Samuel T. Brush, a friend of Campbell, and at his request, to save him from threatened proceedings by the sureties upon his treasurer's bond. From that date, therefore, nothing was due the association from the bankrupt firm.

More than four months thereafter the claim was filed against the bankrupt estate for the liquidated debt, and by Campbell, who had long before ceased to be treasurer, and had no right to collect debts, if there were any due and unpaid to the association. Had there been a debt due the association, Mitchell, his successor as treasurer, alone had the right to file a claim therefor and collect and receive it.

The debt having been paid by Brush and others for Campbell, at his request, he became their debtor for the amount so paid, and having thus satisfied the debt he owed the association, the relation of simple debtor and creditor was created between himself, as an individual, and the firm of Richart & Campbell, the liability of which firm to him as a depositor of the said sum, was not discharged by the payment of said debt to the association. His claim, had he filed it, being divested, as it was, of its trust character, and merely being an individual claim, could not be permitted to share equally with firm claims, but could only be allowed, he being a member of the bankrupt firm, to reach the surplus of the firm assets assigned. It is a clear and well established rule, that the individual partner can not prove a claim against the joint estate in competition with the creditors of the firm, who are, in fact, his own creditors, and thereby take part of the fund, to the prejudice of those who are not only creditors of the partnership, but of himself. *Stratton v. Tabb*, 3d Ill. App. Rep. 228; *Newlin, Admr., v. Bailey*, 15 Ibid. 199. We are of opinion said claim filed by Campbell, as treasurer, was properly disallowed, and the judgment of the County Court is affirmed.

Cassidy Bros. & Co. v. Elk Grove Land Co.

58	39
77	309

Cassidy Bros. & Company v. Elk Grove Land and Cattle Company.

58	39
179	122

1. **FACTORS—Distinguished from Brokers.**—A factor is one who, having goods in his possession, sells them, usually in his own name, without disclosing that of his principal; while a broker does not have such possession, and acts always in the name of his principal.

2. **STOLEN PROPERTY—Purchaser of—Liability.**—The rule is uniform in this country that the purchaser of stolen property, though sold by him to another party, is liable in an action of trover for its conversion.

3. **SAME—Commission Men in Selling—Liable in Trover.**—A firm of commission men received a lot of cattle shipped from Kansas, and sold the same according to the usual course of its business. The cattle had been stolen, and the owner traced them to the commission men, who, upon inquiry, refused to give him any information concerning the cattle, to enable him to trace them. He then brought a suit in trover against the commission men for a conversion of the cattle and recovered.

4. **CONTRACT—For Keeping Cattle Ceases to be Operative, When.**—A contract with a person for the keeping and feeding of cattle until a specified date, ceases to be operative if the person keeping the cattle steals them, and the owner may sue for the cattle without waiting for the expiration of the time fixed by the contract.

5. **MEASURE OF DAMAGES—Conversion of Cattle.**—Where cattle are converted to one's use and sold by him, the measure of damages is the value of the cattle at the time of the conversion, with interest thereon to the date of the trial.

Trover.—Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Declaration in trover; plea of the general issue; jury waived and trial by the court; finding and judgment for plaintiff; appeal by defendant. Submitted at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

APPELLANT'S BRIEF, McDONALD & HOWE AND L. H. HITE,
ATTORNEYS.

Where the factor, acting in good faith and in the course of business, has sold the goods as agent thereby and has paid over the proceeds to his consignor without notice that he is not the owner, he can not subsequently be held to the owner for a conversion. *Meehem on Agency*, 1050; *Roach v. Turk*, 9 Heisk. (Tenn.) 708; 24 Am. Rep. 306.

In actions of trover, it is essential that the plaintiff, at the

time of the alleged conversion of the property, have had not only the right of property in the chattel, but the right to the immediate possession of the same. 2 Greenleaf on Evidence, Sec. 636.

APPELLEE'S BRIEF, DILL & SCHAEFER, ATTORNEYS.

Appellee contended that the case of *Fawcett v. Osborn*, 32 Ill. 411, is, in its facts, very nearly like the case at bar, and settles the law in favor of the appellee. See also, *Burton v. Curyea*, 40 Ill. 320; *Gibbs v. Jones*, 46 Ill. 319; *Klein v. Seibold*, 89 Ill. 540; *McCully v. Hardy*, 13 Ill. App. 631; *Hutchinson v. Oswald*, 17 Ill. App. 28; *Montague v. Ficklin*, 18 Ill. App. 99; *Ellsner & Co. v. Radcliffe*, 21 Ill. App. 195; 6th *Wait's Actions and Defenses*, Sec. 1, page 163.

The owner of stolen property can maintain an action for its value against a party who has innocently purchased it and resold it in good faith. *Sharp v. Parks*, 48 Ill. 511.

It is not necessary to render one liable in trespass or trover, that there should be an appropriation of the thing to the party's own use or beneficial enjoyment. The disposing or assuming to dispose, of another man's goods, without his authority, is a conversion of them. *Mead v. Thompson*, 78 Ill. 62.

An agent, auctioneer, officer, sheriff, constable or private person who sells stolen goods is liable in trover. *Cooley on Torts*, pages 448, 451; 6 *Wait*, 140, 141, 164, 167.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

On October 1, 1893, the appellee placed two hundred and fifty head of cattle in the care of J. F. New, under a written contract, to be fed and cared for on his farm near Derry, Kansas, until about the first of May, 1894. On October 15, 1893, New, fraudulently and without authority, shipped forty-nine head of these cattle to appellants, who were live stock commission men at East St. Louis, Illinois. The cattle arrived at said city on the 16th day of October, and were unloaded in the yards of the National Stock Yards Co., where they remained until sold the next day by an agent

of appellants to Herroitt & Co., for \$957.57, to whom they were delivered. The net proceeds of the sale after deducting freight, yardage, feed and commissions amounted to \$746.50, which was paid to one Davis, in whose name the cattle were shipped. This money was paid by Davis to New. The appellants had no notice of any fraud, or that Davis was not the owner of the cattle.

The appellee did not learn of the loss of the cattle until about the middle of December when New was arrested for embezzlement and pleaded guilty. The cattle were traced to appellants, of whom inquiry was made as to whom the cattle had been sold, with a view of recovering them, but they declined to furnish any information, deeming the inquiry an impertinence. The cattle could not be traced any further, and this suit was brought in trover for their conversion. There is no doubt but that appellants acted in entire good faith, and made the sale of the cattle as commission men in the usual course of business. They should, however, have given appellees full information in regard to their cattle after they learned the cattle had been stolen.

The defense interposed by them now is, that being mere factors in making the sale, they are not liable in this action for conversion. The authorities are not entirely uniform as to the law of liability in a case like this. A factor is said to be one who, having the goods in his own possession, sells them usually in his own name and without disclosing that of his principal; while a broker does not have such possession and acts always in the name of his principal. *Notes to Biglow v. Walker*, 58 Am. Dec. 159. Factors, more than any other kind of agents, have dominion over the property they sell. They can sue in their own name, for the price of goods sold by them. *Wharton on Agency*, Sec. 755. The law would not afford them relief where it would not other agents. The Supreme Court of this State has not yet decided the law of liability of agents in a case like this, so far as we have been able to discover. The case of *Fawcett v. Osborn*, 32 Ill. 411, so strongly relied on by appellee, was based on a suit against the purchaser of the goods, which is true of all the other Illinois cases cited.

The rule is uniform in this country, that the purchaser of stolen property, though sold by him, is liable in an action of trover for its conversion.

The most elaborate discussion of the question of the liability of an agent that we have observed is found in the case of *Hoffman v. Carow*, 22 Wend. 285, by the Court of Errors of New York. There an auctioneer had sold stolen property and after the most careful and exhaustive investigation, it was held, the auctioneer, though entirely innocent of wrongdoing, and having made the sale in the usual course of business, was liable.

The same rule of liability as to auctioneers is laid down by the Supreme Court of Michigan, in *Kearney v. Clutton*, 59 N. W. 419.

In *Consolidated Co. v. Curtis*, 1 Q. B. 494, decided in 1892, auctioneers under a similar state of facts were held liable.

The same rule is laid down in *Lafayette Co. Bank v. Metcalfe*, 40 Mo. App. 494. It is there said, if an agent sells the property of another and thereby cuts off the owner's power to recover the same, or renders the person holding it liable therefor, he will be liable for conversion, notwithstanding his ignorance of the real ownership of the property. See, also, *Baker v. Beers*, 64 N. H. 102.

The rule announced in the foregoing cases seems to have been generally adopted in this country. It is based on the principle that one who has no title or right to property can not pass it to another, and that he who exercises dominion over the same, though temporarily, in attempted aid of such transfer, is guilty of conversion. As against this view, it is urged that such a rule imperils great commercial interests, and that those great agencies by which property is necessarily transferred from seller to buyer, should not be required to investigate title to the property handled at the peril of liability for its value. There is much force in this contention, which has been exhaustively discussed in the cases referred to, and yet, in principle, it is difficult to see why, if the innocent purchaser of stolen property is liable, the agent, who should know better than he, the title, and who induced

the purchase, should not also be equally liable. If the purchaser is guilty of a tort, the one who suggests it and aids in its commission, according to the fundamental rules of law is equally guilty. There are no agencies in torts. Many other cogent reasons are stated for this rule of liability, some of them founded upon the fundamental principles of the right of property, and others on public policy. The only case cited by appellants sustaining a contrary view is that of *Roach v. Turk*, 9 Heiskell (Tenn.) 208. It holds that in order to make the factor liable, demand must be made on him, while the property, or its proceeds, are in his hands, or notice of defective title must, during such time, be brought to his attention, for it is said the factor has no knowledge of the title, nor has he the means of knowledge. This reasoning is not satisfactory, for the factor certainly has a better opportunity to know the title of the property he sells than the one whom he induces to buy it, which buyer, this case concedes, would be liable for conversion, though he had sold it in absolute good faith.

The case in hand, in its facts, illustrates the necessity for the rule of liability laid down by the authorities. This appellee, the plaintiff below, sought of appellants information so they might trace the cattle and obtain possession thereof, which was deemed an impertinence. By reason of such refusal the appellee could not find its cattle. Had it been able to find them, unquestionably replevin could have been maintained for their recovery. The conduct of these appellants balked appellee in its efforts in that direction. The parties who shipped them were evidently worthless, so appellee was without any effective remedy, if it could not maintain an action against appellants. The appellants, doubtless, will not in the future deem such inquiries as were made by appellees, impertinent.

Such conduct is made the basis, in one of the cases referred to, for holding agents liable, for it is said, in effect, the owners would not be able to follow their property, if there was no inducement for the agents to aid them, and therefore, on the ground of public policy as well as of principle, they should be held liable.

It is suggested by appellants that the contract between appellee and New, for the feeding and care of the cattle, was in the nature of a mortgage, which should have been recorded.

It has none of the features of a mortgage. This position is not tenable.

It is also suggested that as New, by the contract, had the right to the possession of the cattle until May 1, 1894, that the appellees could not maintain this action, having, as claimed, no right of possession until the expiration of such time. Suffice it to say that the contract ceased to operate, at least as to these cattle, the moment New stole them. If so as to New, it is equally true as to appellants. Counsel can hardly be serious in presenting such a proposition to the court.

Cross-errors are assigned by appellee on the holding of the court, at the instance of appellants, that, "the conversion complained of was the act of defendants in receiving and selling cattle at East St. Louis, and if they are guilty at all, the basis of the damages recoverable against them, is the value at that time with legal interest." The court rendered judgment on that basis for \$976.48. There was proof on the part of appellee that the cattle were worth at Derry, Kansas, on October 15th, the date of their shipment, \$30 per head, or \$1,470.

The appellee cite the case of *Sturgis v. Keith*, 57 Ill. 458, and a number of other authorities, holding the rule to be, "that the current or market value of property *at the time of conversion*, with interest from that time until the trial, is the true measure of damages." This rule is exactly applicable to that applied by the court. The conversion sued for was that of appellants and not that of New. It is not questioned but that appellants got the full market price for the cattle at East St. Louis, *at the time of the conversion by them*. They were in no way legally connected with the conversion by New. Their act did not relate back to his. No authority is cited in favor of that view. They were not legally or morally responsible for what he did.

The judgment is affirmed.

Daniel Hogan v. Melancthon Easterday.

1. STATUTE OF FRAUDS—*Must be Pledged—Waiver.*—Where the statute of frauds is not pleaded, or in any manner expressly relied upon as a defense during the trial, its protection is waived and it is too late to raise the question for the first time on a motion for a new trial or on error or appeal.

Assumpsit for money had and received. Appeal from the Circuit Court of Alexander County; the Hon. OLIVER A. HARKER, Judge, presiding. Declaration; common counts and plea of the general issue; trial by jury; verdict and judgment for the plaintiff; appeal by defendant. Submitted at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

GREEN & GILBERT and WALTER WARDER, attorneys for appellant.

BOYER & BUTLER, attorneys for appellee.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment against appellant for the balance of \$270, alleged to be due him as one-half of the profits on the purchase and sale of certain real estate, under an agreement between the two men that they should share equally in the profits of the transaction.

There was a sharp conflict of the evidence as to whether or not this was the agreement, but the evidence unquestionably justified the finding of the jury in appellee's favor upon this point.

It is insisted, however, that even though such an agreement may have been made, a full settlement between the parties was afterward effected upon a full disclosure of the facts, whereby appellee accepted a certain sum of money as the balance due him. This, if true, certainly constituted a defense to the action.

Appellant sold the land for railroad purposes for \$825. In order that others might be deceived into selling their

land at a low price, the railroad agent caused the consideration to be stated in the deed at \$250. Appellant telephoned appellee that he had sold the land for \$250. After the railroad company had completed the purchase of such other lands as they desired, another deed was made for the land in question, which stated the true consideration. There is no dispute between the parties as to these facts.

Appellee swears that appellant kept him in ignorance of the real consideration for the land till after the alleged settlement had been made; that the settlement was made upon the basis of the consideration named in the first deed, appellant, even at the time of the settlement, declaring that this was the amount actually received. Appellant swears to a contrary state of facts. There is evidence tending to corroborate each of the parties.

Upon the whole record, therefore, the verdict of the jury is not manifestly against the weight of the evidence on the question of settlement. On the contrary, the verdict is abundantly justified by the evidence.

The claim made upon the trial that this was a partnership transaction, and for that reason, cognizable only by a court of equity, has been abandoned in view of the law on this point as laid down by the Supreme Court in *Morton v. Nelson et al.*, 145 Ill. 586.

It is argued that the statute of frauds is a bar to this action. The statute of frauds was not pleaded, nor was it in any manner expressly relied upon as a defense during the trial. In such case, the protection of the statute is waived, and it is too late to raise the question for the first time on motion for a new trial, or on error, or appeal. *Finucan et al. v. Kendig et al.*, 109 Ill. 198; *Gordon et al. v. Reynolds*, 114 Ill. 118; *Chicago Attachment Co. v. Davis Sewing Machine Co.*, 142 Ill. 171.

There is no material error in the rulings of the court in giving and refusing instructions. The instructions given, when considered together, presented the law with sufficient accuracy to enable the jury to fairly and properly pass upon the issues.

The judgment of the Circuit Court is affirmed.

Emanuel Tottleben v. Boss Blankenship.

1. **SLANDER—Actionable Words.**—To charge a person with maliciously killing a domestic animal, is actionable.

2. **SAME—When All the Words Uttered Do Not Amount to a Charge of Crime.**—In an action for slander it may be shown that all the words uttered at the time did not charge any crime, and that, so considered, no crime was intended to be charged.

3. **SAME—The Sense in Which the Words Are Understood.**—A witness in an action for slander, may be asked as to the impressions the words made upon him, as to whether the person speaking the words intended to impute a crime, or he may state his opinion of the sense in which the slanderous words were understood as to imputing crime.

4. **PLEADING—Notice with the General Issue in Slander.**—A notice which presents no defense is insufficient, and evidence offered under it should be rejected.

5. **EVIDENCE—Mitigation Under the General Issue.**—Under the general issue in slander, all the facts relating to the making of the charge may be offered in mitigation of damages.

6. **MITIGATION OF DAMAGES—Want of Express Malice.**—The want of express malice may be shown in mitigation of damages in actions of slander.

7. **NOTICE—When Implied.**—To willfully charge a person with the commission of a crime implies malice in law, that can not be rebutted, though all the words of the conversation may be shown to determine whether such implication arises, if the meaning of the words is doubtful.

8. **DAMAGES—When Implied.**—When the slanderous words are proved, some damages are implied in law, and so the plaintiff, upon making proof of the charge, is entitled to a verdict for something.

9. **TRIALS—Examination of Witnesses by the Court.**—Where the court by examination of witnesses in an action of slander, creates an impression that if the defendant expressed an opinion, etc., he would not be liable, although he had made the direct charge, and the jury finds for the defendant, the verdict will be set aside.

10. **SLANDEROUS WORDS—How to be Construed.**—Slanderous words must be construed in the sense which the hearers of common understanding would ascribe to them.

Action for Slander.—Appeal from the Circuit Court of Williamson County; the Hon. ALONZO K. VICKERS, Judge, presiding. Declaration in case; plea, not guilty, with notice, etc.; trial by jury; verdict for defendant; appeal by plaintiff. Submitted at the August term, 1894. Reversed and remanded. Opinion filed March 23, 1895.

CLEMENS & WARDER, attorneys for appellant.

YOUNG & BAKER, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellant in his declaration alleges appellee spoke and published of and concerning him certain false and defamatory words, which are set out in various forms, all to the effect that he maliciously charged appellant with having killed his heifer, while trespassing on the latter's premises. To willfully and maliciously kill, wound, maim or disfigure a domestic animal is punishable by imprisonment in the penitentiary for a period not less than one nor more than three years, or by a fine not exceeding \$1,000, or both. Sec. 203, Chap. 38, Statute. A person wounding or maiming a trespassing domestic animal is liable under this section. *Snap v. People*, 19 Ill. 80.

The appellee, therefore, charged appellant with the commission of a crime, revolting in its character. To kill a dumb brute, because, in following its natural instincts, it seeks food on another than its owner's premises, is abhorrent. To willfully and rashly do the act implies malice. *Love v. Moore*, 45 Ill. 12.

To willfully charge the commission of the crime implies malice in law, that can not be rebutted (*Gilmer v. Eubanks*, 13 Ill. 271), though all the words of the conversation may be shown to determine whether that implication would arise, if the meaning is doubtful. *McKee v. Ingalls*, 4 Scam. 30. Or it may be shown that all the words uttered at the time did not charge any crime, and that, so considered, no crime was intended to be charged. *Cooley on Torts*, 199.

In this case the plaintiff clearly proved the slanderous charge. The defendant did not deny that he charged plaintiff with killing his heifer. In fact, he had sued the plaintiff for the value of his heifer on account of such killing, and was defeated in the action.

The general issue was pleaded and also notice given that defendant would offer to show that the heifer "came to her death by reason of wounds inflicted by some kind of an instrument that would produce a wound like a three-pronged

Tottleben v. Blankenship.

pitchfork, and that said wounds were received while upon the premises or in the stable of plaintiff." Such notice does not propose proof of justification. It does not give notice of proof that this plaintiff inflicted such wounds. No issue of law or fact can be formed on a mere notice. It can be tested on the trial when evidence is offered under it. If it presents no defense, then the evidence will be rejected. *Burgwin v. Babcock*, 11 Ill. 20. It is not necessary to assume any evidence was offered under it. Under the general issue all the facts relating to the making of the charge may be offered in mitigation. That is, what was said by the defendant at the time to the witnesses by whom the slanderous charges were proven, may be shown to show the charge was not reckless and wanton. *Thomas v. Dunaway*, 30 Ill. 373. The want of express malice may be shown in mitigation. *Storey v. Wallace*, 60 Ill. 51. The fact that when the defendant went after the heifer she was sick, laid down, etc., may be so shown.

The court can, by instructions, limit such evidence, to its proper purpose. In view of the insufficiency of the notice, we have a right to assume, evidence in the record that would otherwise have been objectionable, was so offered.

The slanderous charges being proved, some damages are implied in law; *Baker v. Young*, 44 Ill. 42; therefore, the plaintiff was entitled to a verdict for something.

The verdict for the defendant is probably explainable on the impression created by the examination of the witnesses by the court, by whom the slanderous charges were proven.

That impression is that if the defendant expressed an opinion, the plaintiff was guilty of killing his heifer with a pitchfork, then he was not liable, although he had made the direct charge averred in the declaration. The court may not have intended to create such an impression, but we think it was created, and accounts for this verdict. No law is cited supporting the view that slanderous words are not actionable because they are the results of an opinion formed from certain facts. The reasons given to support the charge would only tend to deepen the impression in the mind of

the hearer and thereby do greater injury to the person so charged if it was false. It was not for the witness, in any event, to give his understanding that the defendant was expressing an opinion if the defendant spoke the words charged. It was evident the witness understood defendant was making a direct charge against the plaintiff. The proof shows he, unqualifiedly, did make such charge. A witness may be asked as to the impression the words made on him, as to whether the person speaking the words intended to impute crime (*McKee v. Ingalls*, 4 Scam. 32), or get his opinion of the sense in which the slanderous words were understood as to imputing crime, etc. *Nelson v. Borchenius*, 52 Ill. 236.

The words herein must be construed in the sense which hearers of common understanding would ascribe to them and it was the defendant's duty to avoid the use of language which was slanderous in the minds of reasonable men who might hear him (*Nelson case, supra*), unless he could prove the truth of his charge.

The fifth instruction given for the defendant was somewhat in the line of such examination.

The jury was instructed: "In this case, though the jury may believe from the evidence that the defendant did speak the slanderous words charged in the declaration, still, if the jury further believe from the evidence and the facts and circumstances proved on the trial, that the defendant did not intend to impute, and the hearers did not understand him to impute to the plaintiff, the offense which the words might under other circumstances, naturally import, then the jury should find the defendant not guilty."

There is no evidence in this record to sustain or justify this instruction. The jury would probably consider it was based on the examination of the witnesses made by the court, part of which runs as follows: "Q. You did not understand that he had seen this man run a pitchfork into his animal, or anything of that kind? A. No, sir. Q. He simply claimed that he gathered that from the circumstances? A. Yes, sir. Q. And you took it as an opinion of his? A. Yes, sir. Q. That is what I have been

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trying to get at, whether he gave it out that this man run a pitchfork into his heifer, or whether he gave it to you as his opinion from the circumstances? A. Yes, sir." This examination was not proper and no instruction could legally be based on it. The judgment is reversed and the cause remanded.

City of Centralia v. Thomas A. Wright.

58	51
156	551

58	51
63	139

1. **WATERWORKS—Power of Cities and Villages to Erect.**—Under the provisions of Par. 175 and 176, Ch. 24, R. S., a city has power to establish waterworks, to acquire and hold the necessary land for the same by condemnation or otherwise, and to construct thereon, in a proper manner, suitable structures and reservoirs for the purpose of collecting and holding a supply of water for the use of the inhabitants, subject, however, to the provisions of Art. 2, Sec. 13, of the Constitution, providing that private property shall not be taken or damaged for public use, without just compensation.

58	51
112	5426

2. **SAME—Permanent Structures—Damages.**—Where a city erects a dam as a part of a system of waterworks, being of a permanent character, to be maintained as a permanent structure for a proper public use, a person whose property is damaged thereby, may recover in one suit all the damages, present and prospective, necessarily resulting to him from its erection.

3. **DAMAGES—For the Erection of Structures.**—Where a structure is lawfully erected, if permanent in its character and properly constructed, and a suit is brought to recover damages by reason of the erection of such structure, one recovery will be for all future actions for the same cause; but where the construction is faulty and imperfect, the rule does not apply.

4. **SAME—Imperfect Structures.**—A structure, faulty and imperfect, may properly be deemed a nuisance and presumed to be permanent and for the continuance of which successive suits may be maintained as often as an injury is thereby occasioned.

5. **SAME—Action for, When it Does Not Pass by Deed.**—Where structures are permanent in their form and character, and the injury occasioned to the adjoining property is a loss to the owner for which he has a cause of action, and which does not pass by his deed, he alone, and not his grantee, can maintain an action for the injury and resulting damage.

6. **SAME—Present and Future Permanent Structures.**—Where an injury to real estate is permanent in its nature, and not of a temporary

character, the owner may recover not only for the present, but also for future damages, as for depreciation in the value caused by the erection of an obstruction or nuisance, and such recovery will be a bar to any other suits for damages growing out of the continuance of the cause of injury.

7. **NUISANCES**—*Damages and When They Accrue*.—Where the original nuisance to land is of a permanent character so that damages thereby inflicted are permanent, a recovery not only may, but must be, had for all the entire damage in one suit, and such damages accrue from the time the nuisance is created.

8. **MEASURE OF DAMAGES**—*From Public Structures*.—The depreciation in the market value of land arising from a permanent injury thereto caused by the erection of a structure, is a proper measure of damages to the owner.

Action for Damages resulting from the erection of a dam. Appeal from the Circuit Court of Marion County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Declaration in case; pleas of the general issue and statute of limitations; trial by the court; finding and judgment for plaintiff; appeal by defendant; submitted at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

STATEMENT OF THE CASE.

This suit was brought by appellee against appellant for constructing a dam across a stream and thereby stopping the flow of water in its natural course and backing it up upon appellee's land, damaging said land as a pasture and for farming purposes; also destroying a ford across the stream, by which appellee had obtained convenient access to the land. The cause was tried by the court and a finding for plaintiff and judgment thereon for \$250 damages resulted.

The material contentions on behalf of appellant are, first, that plaintiff could recover such damages only as had accrued up to the commencement of the suit, because the structure causing the injury was not of a permanent character, nor the injuries thereby inflicted of a permanent nature; second, that excessive damages were assessed, even upon the theory the cause of injury was permanent and inflicted a permanent injury upon plaintiff by lessening the value of his land.

Appellant leased from the Illinois Central Railroad Company, for twenty years, the property upon which this dam was erected, for the purpose of providing water works to

City of Centralia v. Wright.

furnish the railroad company an increased supply of water for its use, and the people of the city with an adequate supply of water at all times, for the use of the public. To this end, and as a necessary part of the public improvement contemplated, appellant constructed the dam in question to a height within four feet of the top of the banks of the stream, which at that point were about twelve feet high. This dam was constructed in a proper manner, of stone and masonry, entirely across the stream and into each bank thereof, the ends being protected by rip-rap or broken stone. It was a permanent structure and evidently intended to be so maintained as a part of the system of water supply.

SAMUEL L. DWIGHT and FRANK F. NOLEMAN, attorneys for appellant.

APPELLEE'S BRIEF, W. F. BUNDY, ATTORNEY.

Appellant had the statutory right, for the purpose of establishing water works, to acquire and hold the necessary land by purchase, condemnation or otherwise, and construct thereon, in a proper manner, a dam for the purpose of forming a reservoir for such water works. Starr & Curtis, Ch. 24, 508.

Private property shall not be taken or damaged for public use without just compensation. Const., Art. 2, Sec. 13.

All special damages, present and prospective, to the owner of lands, resulting or to result from the proper construction of permanent works of a public nature by a person or persons vested with the legal authority for the purpose of constructing such works, should be recovered in one action. C. & A. R. R. Co. v. Maher, 91 Ill. 312; Rigney v. City of Chicago, 102 Ill. 64; Chicago & W. I. R. R. Co. v. Ayres, 106 Ill. 511; Chicago & E. R. R. Co. v. Loeb, 118 Ill. 203; W. St. L. & P. R. R. Co. v. McDougal, 118 Ill. 229; Chicago & E. I. R. R. Co. v. McAuley, 121 Ill. 160; Ohio & M. R. R. Co. v. Wachter, 123 Ill. 440; K. & S. R. R. Co. v. Horan, 131 Ill. 238; Schlitz Brewing Co. v. Compton, 142 Ill. 511; Am. & Eng. Ency. Law, Vol. 5, p. 20; Lewis, Eminent Domain, Sec. 265; 3 Suth. Dam. 403.

If a private structure or other work on land is the cause of a nuisance or other tort to the owner, the law will not regard it as permanent, and damages can therefore be recovered only to the date of the action. But in the case of permanent injuries caused by lawful public structures properly constructed and permanent in their character, damages may be allowed for the whole injuries, past and prospective. *Schlitz Brewing Co. v. Compton*, 142 Ill. 511.

The proper measure of damages in such cases is the depreciation in the value of the land caused by such permanent injury. *K. & S. R. R. Co. v. Horan*, 131 Ill. 288, and cases cited.

An injury may be permanent in the sense used in the issue without continuing forever. *Bassett v. Johnson*, 2 N. J. Eq. 155, cited in *Am. & Eng. Ency. Law*, Vol. 18, page 333 (note).

Lessee of a railroad company is liable for permanent injuries to property caused by the construction and operation of the road. *Railroad Co. v. Hamilton*, 40 Ohio St. 496; 14 *Am. & Eng. R. R. cases*, 126, cited in *Am. & Eng. Ency. Law*, Vol. 19, 899 (note).

Works constructed and maintained in pursuance of lawful authority are to be regarded in law as permanent structures. This is not so because it is certain that they will continue to exist in their present condition forever, or that they are not liable to be changed, but it is because there is a legal right to maintain them perpetually. *K. & S. R. R. Co. v. Horan*, 131 Ill. 301.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Under the provisions of Par. 175 and 176, Ch. 24, *Starr & Curtis' Rev. Stat.*, page 508, the city of Centralia was empowered to establish and maintain water works, to acquire and hold the necessary land for that purpose by purchase, condemnation, or otherwise, and construct thereon, in a proper manner, a suitable and sufficient dam across this creek for the purpose of collecting water into a reservoir, to hold a supply of water for the use of the public, subject,

however, to the provisions of Art. 2, Sec. 13, Const. 1870, providing that private property shall not be taken or damaged for public use, without just compensation. This dam, then, having been properly constructed, and being of a permanent character, to be maintained as a permanent structure, for a proper public use, appellee was entitled to recover in this one suit all the damage, present and prospective, necessarily resulting to him from its erection.

Where a structure is lawfully erected, if permanent in its character, and properly constructed, and a suit is brought to recover damages by reason of the erection of such structure, one recovery will bar all future actions for the same cause. Where the construction is faulty and imperfect, the rule does not apply. A structure so negligently erected may properly be deemed a nuisance, which may be presumed not to be permanent, and for the continuance of which, successive suits may be maintained, as often as an injury is thereby occasioned. *C., B. & Q. R. R. Co. v. Schaffer*, 26 Ill. App. Rep. 280.

Where the evidence tends to show that certain works built by a railroad company were permanent in their form and character, and that the injury thereby occasioned to the adjoining property was a loss to the then owner, for which he then had a cause of action, which did not pass to the plaintiff by his deed from said owner, the latter alone, and not his grantee, can maintain an action for the injury and resulting damage so occasioned. *C. & A. R. R. Co. v. Calkins*, 17 Ill. App. 55; *Chicago v. Altgeld*, 33 Ill. 23. Where an injury to real property is permanent in its nature, and not of a temporary character, the owner may recover, not only for the present, but also for future damages, as for depreciation in the value of the property, caused by the erection of an obstruction or nuisance, and such a recovery will be a bar to any other suits for damages, growing out of the continuance of the cause of injury, and the grantee of such owner can not maintain an action for such continuance. *C. & A. R. R. Co. v. Maher*, 91 Ill. 312; *W., St. L. & P. Ry. Co. v. McDougal*, 118 Ill. 229.

Where the original nuisance to land is of a permanent character, so that the damages thereby inflicted are permanent, a recovery not only may, but must be had for the entire damages in one suit, and such damages accrue from the time the nuisance is created. C. & E. I. R. R. Co. v. McAuley, 121 Ill. 160; K. & S. R. R. Co. v. Horan, 131 Ill. 288; C. & A. R. R. Co. v. Henneberry, N. E. Rep. Dec. 28, 1894, p. 1043.

Having found the facts to be that the dam was lawfully and properly constructed and permanent in its character, and a necessary part of a permanent public improvement, and was a permanent injury to appellee when it was built by appellant, by depreciating the market and rental value of his land, we reach the conclusion, fortified by the foregoing authorities, that appellee had the right in one action to recover all the damages for the injury so occasioned.

The damages assessed were not excessive, but quite moderate. The depreciation in the market value of land, arising from a permanent injury thereto, is a proper measure of damages to the owner. K. & S. R. R. Co. v. Horan, *supra*.

Appellant insists that the court erred in holding certain propositions to be the law, as requested on behalf of plaintiff, and in refusing to so hold certain propositions on behalf of defendant. We perceive no error in this regard. The law as held by the court, under the evidence, was in harmony with the decisions cited, and the refused propositions were in conflict therewith. Some other reasons are urged for reversal, but an examination of the record satisfies us they are without merit. The judgment is affirmed.

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George M. Brinkerhoff and Margaret V. Oliver, Administratrix of Edward T. Oliver, v. Joseph Telford.

1. RES ADJUDICATA.—*Matters Litigated at Law.*—When the subject-matter of a bill in chancery has been litigated in an action at law, the matter becomes *res adjudicata*.

Brinkerhoff v. Telford.

Bill to Set Aside a Judgment.—Appeal from the Circuit Court of Marion County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Submitted at the August term, 1894. Reversed, etc. Opinion filed March 23, 1895.

L. M. KAGY, attorney for appellants.

S. L. DWIGHT, attorney for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

Brinkerhoff and Oliver obtained a judgment against Telford in the Circuit Court for commissions for securing a loan for him. Telford was not present in court at the time judgment was rendered, but was sick at his home in the country. After judgment the facts in regard to his illness, and the alleged facts in regard to the conduct of one Whitlow, who was the agent of the plaintiffs, were set out fully in affidavits filed in support of a motion for new trial. These affidavits tended to show that Telford had a meritorious defense, which he was prevented from making by the misconduct of Whitlow. Counter affidavits or evidence was heard, and the motion for a new trial was overruled and the case appealed to this court, where the judgment was affirmed. After that, this case was begun in chancery by Telford, to set aside said judgment, to which Whitlow was made a party defendant, with Brinkerhoff and Oliver.

The bill sets up substantially the same facts that were set out in the affidavits used on the motion for new trial. It alleges the defendants conspired to deceive and defraud Telford. It would be useless to set out in detail the evidence introduced on this trial and on the motion for a new trial, and go into a minute analysis thereof. It is conclusion and not argument that is wanted in an opinion based upon facts. After a careful investigation of the evidence, we are unable to find that any conspiracy existed on the part of any of the defendants to defraud or deceive Telford, and especially are we unable to find that Whitlow designed or desired to mislead him. The bill is based upon such alleged fraud of Whitlow. These averments are the life of

this case. Our finding, therefore, defeats it. Ward v. Durham, 134 Ill. 195.

The subject-matter of this bill was litigated in the case of Telford v. Brinkerhoff et al., 45 Ill. App. 586, and therefore it is *res adjudicata*.

It is unnecessary to look into other questions raised in the arguments of counsel. The decree will be and is hereby reversed, with directions to dismiss the bill.

B. F. Hoggins v. George Coad.

1. SEDUCTION—*Where No Recovery Can Be Had*.—Where the evidence in an action for seduction fails to show that the wife was actually seduced, but that her fall was rather the result of her own licentiousness, no damages can be recovered for actual seduction.

3. INSTRUCTIONS—*Assuming Matters Not Proven*.—An instruction which assumes the existence of matters not in evidence, is erroneous.

Trespass on the Case for seduction. Appeal from the Circuit Court of Jasper County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1894. Reversed and remanded. Opinion filed March 23, 1895.

GIBSON & JOHNSON, attorneys for appellant.

HORACE S. CLARK, attorney for appellee.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant for the seduction of his wife and recovered a judgment for the sum of \$4,500.

According to appellee's testimony, when he found his wife and appellant on the bed together, *flagrante delicto*, he made no alarm, but started toward the stable to get his ax. The voice of his sweet child caused him to desist from his purpose to procure this murderous weapon. He returned to the house and found that appellant had gone to the stable,

whither he followed that gentleman whom he found there engaged in saddling his horse. Appellee called appellant an opprobrious name, remonstrated with him for his ingratitude and told him that death would be his portion were it not for his, appellee's, two children. Appellee was appellant's tenant. Appellant was an unmarried man and had been boarding with appellee part of the time for some years. After appellee had found his wife and landlord in the act of adultery, the three continued to live and eat together for some time as they had been doing theretofore. Appellee was evidently not a man of very fine feelings on the subject of his wife's infidelity. This is no reason under the law, however, why he should not recover damages; and yet the verdict should not be permitted to remain undisturbed, if the jury were authorized by the instructions to estimate the damages on an improper basis.

Three instructions were given for appellee, and all of them related to the question of damages. The second and third of these instructions are argumentative, and give the jury undue liberty in the assessment of damages.

The second instruction states that, while loss of service is a proper element of damages, the real and substantial damages are for the alienation of the wife's affection, the loss of her society, etc., "and all other proper considerations applicable to the circumstances and surroundings of each particular case."

The final clause of this instruction is indeed a sweeping permit to the jury to determine for themselves without any direction from the court, what "other considerations" might properly be made the basis of damages. It is impossible to tell what liberty might be assumed by a jury under such circumstances. Part of the damages awarded may have been given upon grounds not recognized by the law or justified by the evidence; and where the damages are large, an error of this nature can not be overlooked.

The third instruction is as follows: "The ground upon which evidence of a pecuniary condition and ability of defendant is allowed to be given to the jury and to be considered by them is, that actions for seduction are given not

only as a means of compensating the injured party, but for the punishment of the seducer as well, and what might be an adequate punishment to one person under certain circumstances, might not be to another under different circumstances. Besides, the pecuniary circumstances and station of the seducer may have contributed largely, with other artifices, persuasions, promises and professions employed, to accomplish the ruin of his victim, and in all cases the question of damages is left to the judgment and discretion of the jury in each particular case, to be arrived at by them from all the facts and circumstances proven in the case."

This instruction practically tells the jury that appellant is a seducer, that his pecuniary circumstances may have aided him in the seduction, and that he used artifices, persuasions, promises and professions to accomplish the ruin of his victim. There is no evidence to show the employment of any artifice, or the use of any persuasion, promise or profession for this purpose. The evidence does not show that the wife was actually seduced, but shows rather that her fall was the result of her own licentiousness. Under such circumstances no damages can be recovered for an actual seduction.

In *White v. Murtland*, 71 Ill. 250, it was said: "Upon the principle that plaintiff's daughter was incapable of consenting, the fact that she yielded without force or seduction would not constitute a bar to the action. Still it seems to be settled, and properly so, that if a seduction be not proved, damages for seduction should not be given." The verdict in the *White* case was for the sum of \$6,000, and the court, in reversing the judgment, made use of the following language: "Inasmuch as the damages awarded are very large, if not excessive, we feel constrained to reverse the judgment for the errors pointed out, believing that it (the case) ought to go before another jury."

See in this connection *Leucker v. Steilen*, 89 Ill. 545, and *Sedgwick on the Measure of Damages*, 5th Ed., p. 633 and notes.

Under these authorities it was error to give appellee's

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third instruction. A part of the large amount of damages allowed may have been for seduction in fact, when no actual seduction was proved. The instruction is also objectionable as being argumentative, as before stated.

The discussion of the other questions argued is deemed unnecessary.

For the errors indicated, the judgment is reversed and the cause is remanded.

Waterloo Milling Co. v. H. Kuenster & Co.

1. **BANKS—As Collecting Agents and Debtors.**—When a bank receives paper for collection it is required, like other agents, to exercise due diligence in the discharge of the self-imposed duty, and when it collects the money and enters the same on its books as a credit, the relation of debtor and creditor is at once created.

2. **SAME—As Collecting Agents.**—When commercial paper is drawn upon or payable by a person at a distance and the drawer deposits it with his home bank for collection, it is assumed that such paper is to be handled according to the usual course of business, that is, transmitted to some solvent and reliable agency at or as near the residence of the payor as practicable, for collection.

3. **SAME—Collections by—When Agents and When Debtors, etc.**—Where a bank receives a draft for collection drawn upon a person at a distance, it has the implied power to select the agent to whom it will send the same for collection, and when selected he becomes the agent of the holder or owner of the draft so transmitted, and when such agent collects the money he becomes the debtor of the drawer and not of the bank transmitting the paper. Although the bank would become the debtor of the drawer upon its receipt of the money from the agent.

Assumpsit, for money had and received, etc. Appeal from the Circuit Court of Monroe County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1894. Affirmed. Opinion filed March 24, 1895.

APPELLANT'S BRIEF, JOSH WILSON AND HARTZELL & SPRIGG, ATTORNEYS.

The ordinary relation existing between a bank and its depositors is that of debtor and creditor. Johnson v. Wood, 2 Brad. 263.

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59	591
58	61
158	259
58	61
84	183

Banks can only avoid responsibility by limiting their liability by express agreement. *Fay & Co. v. Strawn*, 32 Ill. 295; *Drovers National Bank v. Anglo-American Packing Co.*, 18 Ill. App. 139.

Where bills or checks are deposited with a bank for collection, the bank is an agent to collect, and not merely to transmit for collection, and is liable for the neglect of any of its agents, however proper the selection may have been. *Montgomery County Bank v. Albany City Bank*, 3 Seld. (N. Y.) 459; *Reeves v. State Bank of Ohio*, 8 Ohio St. 465; *Allen v. Merchants Bank*, 22 Wend. (N. Y.) 215; *Hoover, Assignee, v. Wise et al.*, 1 Otto (U. S.) 308.

Where a bank received a draft for collection and sent it to its agent, who obtained the money on it, but becoming embarrassed failed to remit, the bank became, *ipso facto*, liable for the amount received by its agent. *Bradstreet v. Everson*, 72 Penn. St. 124; *Mackay v. Ramsay*, 9 Clark & Fin. 818.

The appellees being chargeable with the receipt of the funds by themselves or agents by collection of the drafts, and having used the funds collected, are liable for the amount. *Marine Bank of Chicago v. Rushmore et al.*, 28 Ill. 471; *Corbit v. Bank of Smyrna*, 2 Harr. 235; *President and Bank of Kentucky v. Whister*, 2 Peters, 318; *Bank of Missouri v. Benoist*, 10 Mo. 519; *Edward v. Morris*, 1 and 2 Ohio, 241.

Where a bank makes a collection for a customer, and holds the proceeds, which pass into the general funds of the bank, the relation of debtor and creditor arises, and not that of principal and agent, and all risk as to the funds is that of the bank. *Edwards on Bailments*, 66; *Commercial Bank of Albany v. Hughes*, 17 Wend. 100; *Smedes v. Bank of Utica*, 20 Johns. 379, 380; *Chapman v. White*, 2 Selden, 417; *Munn v. Burch*, 25 Ill. 35; *Matter of Franklin Bank*, 1 Paige, 249; *U. S. Bank v. Bank of Georgia*, 9 Wheat. 342; *Corbit v. Bank of Smyrna*, 2 Harr. 235; *Wray v. Tuskegeo Ins. Co.*, 34 Ala. 58; *In Matter of Stafford*, 11 Barb. 354; *Marine Bank of Chicago v. Rushmore*, 28 Ill. 471.

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While it may be said that the bank is the agent in receiving and transmitting the drafts to another bank for collection, yet when the agent collects and mingles the funds of its principal with its own, or uses them, it becomes a debtor to its principal. In *Matter of Stafford*, 11 Barb. 354; *Wren v. Kirton*, 11 Vesey, Jr. 382; *Case v. Abeel*, 1 Paige, 402; *Story on Agency*, Sec. 228 and note, Sec. 229; *Marine Bank of Chicago v. Rushmore*, 28 Ill. 471.

Where a bank receives a check for collection, the instruments employed by such bank in the business contemplated are its agents, and not the sub-agents of the owner of the check. *Hoover v. Wise*, 1 Otto (U. S.) 308; *Reeves v. State Bank*, 8 Ohio (N. S.) 465; *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Morgan County Bank v. Albany City Bank*, 7 N. Y. 459.

APPELLEES' BRIEF, TRAVOUS & WARNOCK, ATTORNEYS.

Where a draft is left with a bank for collection and is transmitted by it in due season to a suitable agent at the place of the residence of the drawee, with the necessary instructions, it thereby fully discharges its duty and is not liable for loss accruing through negligence of the latter. While some courts hold the bank in such cases to a greater degree of responsibility, the better reasoning and weight of authority support the rule as here stated. *Mechem on Agency*, Sec. 514, page 349; *Morse on Banking* (2d Ed.) 414, (3d Ed.) Ch. 17; *Ætna Ins. Co. v. Alton City Bank*, 25 Ill. 243; *Drovers Nat'l Bank v. Anglo-American Provision Co.*, 18 Ill. App. 191; 117 Ill. 100; *Fabens v. The Mercantile Bank*, 23 Pick. 330; *Daly v. The Butchers & Drovers Bank*, 56 Mo. 94; *Laurence v. Stonington Bank*, 6 Conn. 521; *Citizens Bank v. Howell*, 8 Md. 530; *Stacy v. Dane County Bank*, 12 Wis. 629; *Guelich v. Nat'l State Bank*, 56 Ia. 434; *Third Nat'l Bank v. Vicksburg Bank*, 61 Miss. 112; *Bank of Louisville v. First Nat'l Bank of Knoxville*, 8 Baxt. 101; *Merchants Nat'l v. Goodman*, 109 Penn. St. 422; *Hyde v. Planters Bank*, 17 La. 560; *German Nat'l Bank v. Burns*, 12 Colo. 539; *Bank of Lindsborg v. Ober*, 31 Kans. 599; *First Nat'l Bank v. Sprague*, 34 Neb. 318.

The courts, which hold the bank receiving paper for collection liable for the negligence of its corresponding bank, do not so hold in cases like the present, where the undertaking is to "transmit for collection." The distinction between engaging to do a thing and engaging to procure it to be done, is recognized in all the cases. *Daniel on Negotiable Instruments*, Vol. 1, Sec. 345; *German Nat'l Bank v. Burns*, 12 Col. 539; *Bank of Washington v. Triplet*, 1 Peters 28-30; *Exch. Nat'l Bank v. Third Nat'l Bank*, 112 U. S. 275; *Farmers Bank v. Owens*, 5 Cranch C. C. 504.

Appellees having discharged their full duty in the premises, were entitled to recover from appellant the money paid them upon the drafts received from appellant's agent, which proved worthless, less the amount afterward received from the receiver, and the Circuit Court properly so held. *Drovers Nat'l Bank v. Provision Co.*, 117 Ill. 100; *Bank v. Cummings*, 89 Tenn. 609; *Rapp v. Nat'l Bank*, 136 Penn. St. 426; *Farmers Bank v. Owens*, 5 Cranch C. C. 504.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This case was tried by the court on the following written stipulation of facts. The substance only will be given for the purpose of presenting the legal questions raised by this appeal.

The appellant, plaintiff below, is a milling company at the city of Waterloo, and has been for seven years last past; the appellees were engaged in the banking business, as partners, at said city, for eleven years last past. "On the 21st day of August, 1891, the plaintiff delivered to the defendants its thirty days' date draft on one M. J. Hayer, of Wilmington, North Carolina, for \$613, with bill of lading attached, for flour shipped that day to said Hayer, the said draft to be transmitted by defendants for collection. That on the same day the draft was received by the defendants, it, together with the bill of lading attached, was sent to the First National Bank of Wilmington, N. C., with instructions to collect same and remit to the defendants. This draft was transmitted as above stated for collection, in the

usual course of business, without any special instructions, or any special arrangement as to compensation, except that the defendants were in the habit of charging plaintiff nothing except costs to them of such collection.

The plaintiff had been doing business with defendant's bank since 1886, and kept its deposits with said bank."

Eleven drafts, in all, were so drawn on parties in Wilmington, N. C., and were so transmitted, amounting in the aggregate to \$1,787. Nine of the drafts were sent by appellee to the bank above mentioned, and two were sent to the bank of New Hanover, of the same city. The drafts were all collected by the banks to which they were sent. It is stipulated these banks were in good standing when the drafts were sent and that appellees exercised due diligence in their selection. It is further agreed that on the 24th day of November, 1891, the appellees received from the First National Bank of Wilmington two drafts upon the United States Bank of New York City in the aggregate for the sum of \$940.25; that on the receipt of said drafts, and without intelligence of the failure of said First National Bank, said amount was paid to appellants and the drafts forwarded to New York, where they were at once protested, and nothing realized from them, the said First National Bank having failed on the 25th day of November, 1891.

It is also agreed the Bank of New Hanover, of Wilmington, also failed, and that neither bank ever remitted the collections so made by them except as above stated. The said drafts having been indorsed by appellants to appellee before their transaction, the appellees make proof before the receivers of said banks, for the amount of the several drafts in their own names. The appellees received as dividends on said drafts from the receiver of the First National Bank, the sum of \$625.92, but nothing from the receiver of the Bank of New Hanover.

The declaration counted for money had and received by the defendants from divers persons, as agents of the plaintiff. The defendants pleaded the general issue and set-off.

The court below rendered judgment in favor of the defendants for the difference between the amounts received by them and the amount paid by them to appellants on the New York drafts. That is, these drafts were for \$940.25 and the amount received was \$625.92.

The position of the appellees is that they were mere agents to transmit the drafts for collection to the Wilmington banks, and therefore, under the law as laid down in *Ætna Ins. Co. v. Alton City Bank*, 25 Ill. 243, and kindred authorities, they are not liable to appellants.

The position of appellant is, that while the appellees may have been their agent in receiving the original drafts and transmitting them for collection, yet when the money was in fact collected by the Wilmington banks, then the agency of appellees terminated and their relation to appellant at once became that of debtor, under the rule of law laid down in *Marine Bank v. Bushman*, 28 Ill. 463, and similar authorities.

It is the law that when a bank receives paper for collection, it is required, like other agents, to exercise due diligence in the discharge of the self-imposed duty (*Ætna Ins. Co. v. Alton City Bank*, 25 Ill. 243); and when such bank collects the money and enters the same on its books as a credit, the relation of debtor and creditor is at once created. *Marine Bank v. Rushman*, 28 Ill. 471. If such paper is drawn upon or payable by a person at a distance and the drawer deposits the same with his home bank for collection, it is assumed that such paper is to be handled according to the usual course of business. That usual course is to transmit the same to some solvent and reliable agency, at or as near the residence of the payor as practicable, for collection. The right to appoint such agent is implied in such cases for the reason it is not intended or expected the home bank will itself demand and receive directly the money from the payor. The home bank is used because it is supposed to know the proper agent to select at the point of residence of the payor. It is well known that it is a part of its business to keep posted on such matters. If the owner of such paper was

so posted, he could send the same himself directly to such agency.

The agent so appointed becomes the agent of the holder or owner of the paper, so transmitted. *Bank of Washington v. Treplett*, 1 Peters 28; *Guelich v. National State Bank*, 56 Iowa 434; *Daley v. Butchers & Drovers Bank*, 56 Mo. 94; *Fabens v. Mercantile Bank*, 23 Pick. 332.

If, then, these Wilmington banks became the agents of appellants, when they collected the money, their relations at once became that of debtor to the appellant. Until the money was so collected their relation was that of agents, like that of appellees. Had appellees received the money then their relation would have been that of debtor. The implied contract, however, was that they continued to be such agents until the money was received from appellant's other agents, when the relation of debtor would arise.

Therefore, the relation of debtor and creditor could only exist as to the money received. Had they failed to perform their duty as agents, then an action for such breach would lie for the recovery of the damages appellants sustained.

The case of *Ætna Ins. Co.*, 25 Ill. 243, *supra*, is directly in point. On page 247 it is said: "Where a bank receives a bill or note for collection against a drawee or maker, resident at the place of the bank, or where the bank undertakes for its collection by their own officers, there can be no doubt that it would be liable for any loss that might result from neglect. But when received for transmission, it has fully discharged its duty by sending the instrument in due season to a competent, reliable agent, with proper instructions for its collection. This is manifestly the rule clearly announced in a large majority of adjudged cases."

The case of *Marine Bank v. Rushman*, 28 Ill. 463, which appellant's counsel insist is in many respects parallel with the one in hand, and should alone determine this suit in favor of appellant, we do not think is applicable to the conceded facts here. That case holds on the fact, that the defendant bank only was authorized to collect the certificates in coin or its equivalent. It is there said, p. 473:

"The record nowhere shows in what description of funds the certificates were paid. There is an entire absence of proof on that point and the inference is not an unfair one that they were collected in coin or its equivalent." The bank in that case did not deny its liability but asserted a tender and its readiness to pay in "Illinois currency," which was nominated in the certificate. It did not deny that such collection had been mingled with its own funds and a credit entered in favor of the plaintiff. The court, under such facts, held that it became a debtor, and liable for full value of amount collected in coin or its equivalent.

The marked distinction in the two Illinois cases referred to is, that in the former the bank received the paper to be *transmitted* for collection to the *place of residence* of the payee, while in the latter case, the bank, *at the residence of the payee, received and collected* the paper.

It was the only agent and actually received the money. It stood in the same relation to the owner of the paper, after its collection, that the Wilmington banks did to appellant after their collection in this case.

The case of *Bradstreet v. Evans*, 72 Penn. St. 124, relates to an entirely different state of facts. There it is stated: "The defendant was a commercial agency in Pittsburg, *with agents throughout the United States*, for the collection of commercial paper. The court held the receipt for collection imputed an undertaking by the collecting agent himself to collect and not merely to transmit the paper to another agent. He is, therefore, liable by the very terms of his receipt. The bank, in this case, did not hold itself out as having agents already appointed to collect, nor did it give a receipt undertaking for itself to make the collection. The case of *Mackay v. Ramséy*, 9 Clark & Fin. 818, seems to be in line with *Allen v. The Merchants Bank*, 22 Wend. 215, which our Supreme Court refused to follow, as stated in the *Ætna Ins. Co. case, supra*. The case of *Drovers National Bank v. Anglo-American Packing Co.*, 18 Ill App. 139, relates to a state of facts, where the original agent sent a certified check for collection directly to the drawees. The

 East St. Louis Connecting Ry. Co. v. Eggmann.

point of that case is stated to be, "was the mailing said certified check directly to the drawees, who were primarily liable for payment, the selection of a suitable or competent agent for its collection." The court held that was negligence, and the decision was affirmed in 117 Ill. 100. In the case in hand it is conceded the drafts were recorded to be transmitted for collection to other agents, and that such agents were suitable, solvent and competent at the time.

The judgment of the court below was in harmony with these views and it is affirmed.

East St. Louis Connecting Railway Company v. E. J. Eggmann, Administrator of Joseph F. Newland.

1. RAILROAD COMPANIES—Actions for Personal Injuries—Evidence Insufficient.—The court discusses the evidence, reverses the judgment and remands the case on the ground that the evidence is insufficient to sustain the verdict.

Trespass on the Case, for personal injuries. Appeal from the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding. Heard in this court at the August term, 1894. Reversed and remanded. Opinion filed March 23, 1895.

CHARLES W. THOMAS, attorney for appellant.

JESSE M. FREELS and A. R. TAYLOR, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

Appellant owns and operates a double-track railway in East St. Louis, extending north and south along the east part of the levee, on the east side of the Mississippi river, and by, on and along the west part or line of Front street, of the city of East St. Louis, with side tracks connecting its main track with the tracks of the different railroad lines terminating on the east side of said

58	60
65	346
58	60
71	34

Front street, and on the west side of its railway, it has, at the place where the injury occurred, side, or short tracks, extending from its main tracks down southwestwardly along the levee to a large wharf-boat (or "cradle") and on and along said boat to the southwest end thereof, where said tracks connect with the tracks on the steam transfer ferry boat when it is in position.

On the east side of the easterly one of these two tracks built along the side of the levee from the main tracks to the boat, as aforesaid, there is a bank from three to four feet high, caused by digging down the dirt from the levee on the east side which slopes down west to the river, to make a proper road-bed for the tracks. Plaintiff's evidence shows that Joseph F. Newland, the deceased, on the 19th day of October, 1891, was a carpenter in the service of appellant, and at the time of the injury was engaged in the discharge of his duty near the top of the hill, 200 yards northeast from the wharf-boat, constructing a wooden trough or drain across underneath these tracks, to drain the water through under them, west to the river from the grounds and main tracks east. The declaration alleges that while so engaged, and while exercising all due care and diligence, defendant's engineer, in charge of its engine and freight cars, negligently and carelessly ran said engine with great force and violence against and upon said Joseph F. Newland, thereby inflicting upon him such injuries to his leg and body that he died from said injuries. The declaration also avers that the engine was run at an unlawful rate of speed. There was evidence to show the speed was eight miles an hour, while the limit of the ordinance was six miles. It is also averred the bell was not rung or whistle sounded. The evidence sustained this averment. The evidence also showed the deceased had worked in those yards, where engines were almost continuously moving, for a number of months. He had been working on this particular job the day before the injury and all the morning before the accident, during which time the engine and cars were being frequently run over that part of the track.

It is quite evident the deceased was entirely familiar with the movement of the cars, which were operated not on any time table, but as occasion required. If it is conceded, in view of these facts, that appellant owed the duty to the deceased to give signals at all places along its tracks when running cars, the serious question still remains, whether the evidence sustains the averment of the declaration above quoted.

There were only two witnesses testified who saw the accident, William Reed and Owen Tinelin. The deposition of the former was taken by the appellee, which tended to show that Newland was struck by the engine while at work and without warning from the engine. He also states that Newland was nailing on a board just before he was struck. The appellant made Reed its witness. He testified that a Mr. Little was helping Newland, and when he—Little—heard the engine coming up the hill, he gave Newland warning, at which time he was clear of the engine. He had hold of the rods that run up and down the safety switch. When Little called to him, he turned around and slid down the trough against the engine. The other witness, Tinelin, testified that he was engineer on the engine that caused Newland's injury; that he ran it up and down that incline eight or nine times that morning; says he was constantly on the lookout; saw Newland and Little get out of the way when twenty or thirty feet away from them, then when within about five or six feet away from Newland, he seemed to lose his hold, turn, slip and fall down far enough for the beam of the engine to catch him in the hip and knock him down. He further said Newland had gotten out of the way every time he had passed that morning; that there was plenty of room—six or eight feet—with rods running to the safety switch all along down the hill. He also stated that Newland was out of the way, and there was no necessity to give him warning; that he did not get in the way until the engine got within six or eight feet of him. Without further comment, we do not consider the evidence sustains the judgment, and therefore reverse and remand the cause.

Thomas J. Pinkstaff v. William A. Cochran.

1. **CHATTEL MORTGAGES—On Merchandise, When Void.**—A chattel mortgage upon a stock of merchandise which, at the time of its execution the mortgagee knew would continue to be sold at retail and which the mortgagor did continue to sell at retail thereafter, is void as to purchasers and execution creditors.

2. **SAME—Where Possession is Taken.**—When a chattel mortgage is made as aforesaid, if possession of the property is taken under it before the rights of third parties accrue, the mortgagee will hold the property. Possession so taken is not vitiated by the illegal provisions of the mortgage.

3. **SAME—When Not Fraudulent.**—A mortgage on merchandise under which the mortgagor is permitted to continue the sale of the same at retail is not of itself a fraudulent conveyance of property in the absence of a fraudulent intent.

4. **SAME—Fraudulent in Law—Good as Between the Parties.**—A chattel mortgage fraudulent in law as to third persons is good as between the parties to it, as where it is not properly acknowledged or recorded.

5. **SAME—After-Acquired Property.**—A stipulation in a mortgage upon a stock of retail merchandise, that the mortgage shall include subsequently acquired stock, is an executory agreement of such a character that the mortgagee may, under it, take the property into his possession when it comes into existence and hold it for his security, and if he reduces it to his possession before any other lien has attached, he will hold it.

6. **SAME—On Property Not in Existence.**—A valid mortgage may be given upon property not owned by the mortgagor and not then in existence, if the mortgagor afterward acquires it, but it is not good as against creditors or purchasers as to such property until possession is taken by the mortgagee.

7. **FRAUD—Permitting Mortgagor to Sell Goods at Retail.**—It is a fraud in law on the part of a mortgagee to permit the mortgagor of a stock of merchandise to make sales of the same at retail.

8. **BURDEN OF PROOF—In Replevin.**—In replevin, where the defendant pleads property in a third person and justifies under an execution, the issue is the right of the plaintiff to the property and he must sustain his right or fail in the action.

Replevin.—In the Circuit Court of Lawrence County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding; declaration, etc.; pleas of *non cepit*, *non detinet*, justification and title in stranger; issue joined on first two and replication as to the third and fourth pleas, and issue joined on

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same; trial by the court; finding for defendant; appeal by plaintiff. Submitted at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

APPELLANT'S BRIEF, J. E. McGAUGHEY, P. G. BRADBURY AND
B. S. ORGAN, ATTORNEYS.

When new goods have been added to a mortgaged stock and the mortgagee takes possession of the entire stock, by consent of the mortgagor, by way of pledge before the rights of creditors have intervened either by attachment or levy, he has a right as against such creditors to enforce his mortgage against all the goods. If attachments or levies of execution be made upon such goods, after the mortgagee has taken possession, these can affect only the remainder of the goods or proceeds thereof after the mortgage is paid. *Chapman v. Weimer*, 4 Ohio St. 481; *Jones on Chattel Mortgages*, Sec. 482 and 164a; *People v. Bristol*, 35 Mich. 28.

A chattel mortgage given to secure a debt which does not mature until after the expiration of two years, and provides for possession by the mortgagor until it does mature, will only be good for two years from the date of the mortgage; after that time it ceases to be a lien. *Cook v. Thayer*, 11 Ill. 617.

APPELLEE'S BRIEF, GEE & BARNES AND FOSTER & ROBINSON,
ATTORNEYS.

A chattel mortgage can not be made valid as to after-acquired property against the claims of creditors. *Hunt v. Bullock*, 23 Ill. 30; *Titus v. Mabey*, 25 Ill. 257; *Schermerhorn v. Mitchell*, 15 Ill. App. 419.

A mortgagee who allows mortgaged property to be sold, without requiring the proceeds thereof to be applied upon the mortgage debt, loses the lien thereof. *Orebaugh v. Davis*, 44 Ill. App. 598; *Simmons v. Jenkins*, 76 Ill. 479; *Goodheart v. Johnson*, 88 Ill. 58.

An agreement that the mortgagor might sell the goods and account to the mortgagee, is fraudulent and void. *Deering v. Washburn*, 141 Ill. 153.

A mortgagee who permits his mortgagor to sell the mortgaged property in the usual course of trade, destroys the efficacy of the mortgage, and the same becomes void as to creditors. *Davis v. Ransom*, 18 Ill. 396; *Barnet v. Fergus*, 51 Ill. 352; *Dunning v. Mead*, 90 Ill. 376; *Greenbaum v. Wheeler*, 90 Ill. 296; *Huschle v. Morris*, 131 Ill. 587; *Yoger v. Messinger*, 15 Ill. App. 263.

Possession must be taken and a delivery made, property movable must be removed or the transaction will be fraudulent. *Twyne's case*, 3 Coke, 80; S. C., 1 Smith Leading Cases, 1; *Curran v. Bernard*, 6 Ill. App. 341; *Lewis v. Swift*, 54 Ill. 436; *Broadwell v. Howard*, 77 Ill. 305; *Allen v. Carr*, 85 Ill. 388; *Thompson v. Wilhite*, 81 Ill. 356; *Ticknor v. McClelland*, 84 Ill. 471.

A mortgage upon a stock of merchandise under that general description, attaches only to such merchandise as was in the store when the mortgage was executed, and not any afterward purchased. *Rockford Watch Co. v. Manfield*, (Neb.) 55 N. W. Rep. 236; *Van Vectin v. McKane*, 23 N. Y. S. 428, 69 Hun 510.

A chattel mortgage can not be used by the mortgagee to protect his mortgagor and hinder and delay creditors. *Stromvh. Hayes*, 70 Ill. 40; *Blotchford v. Boyden*, 18 App. 379.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This case was tried before the court and the record shows the following state of facts: That appellant, on the 11th day of April, 1892, sold his store building and stock of general merchandise therein to T. J. and Wm. F. Shively, for \$4,500, on which was paid \$2,500, and the balance secured by chattel mortgage on the stock of goods then in the store, payable as follows: \$1,000 in two years and \$1,000 in three years from said date. The purchasers entered into immediate possession of said property, and began to make sales at retail, as had theretofore been done. This was with the full knowledge and evident consent of appellant.

In October, 1892, Wm. Shively sold out his interest to his brother, Thomas, for \$1,500, the amount of money he had

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contributed to the original purchase, and took a note therefor. On August 31, 1893, he took a new note, for the sum of \$1,582.50, due September 1, 1894, which was secured by a chattel mortgage on the stock of goods, subject to the mortgage given to the appellant, and filed for record September 25, 1893.

On September 25, 1893, Thomas Shively confessed judgment in favor of Hulman & Co., for \$306, on which execution was issued and placed in the hands of the sheriff on October 9, 1893. Up to this time less than \$40 had been paid on the debt of appellant. Prior to this time—about October 1st—appellant was informed by Shively that he had given judgment notes, but the parties had promised to give him a few days in which to pay them; that if they did not do so, he should protect himself by taking possession of the goods. Shively, about that time, left for Chicago, and during his absence, on the 4th day of October, appellant took possession of the stock of goods, and wired Wm. Shively, in Indiana, of the fact, who answered, requesting appellant to also take possession for him. On the 5th of October he came to Pinkstaff, Ill., and also claims that possession was taken under his mortgage, in subordination to that of appellant. An inventory was taken by appellant, which showed there was \$5,200 worth of stock in the store, about one-half of which was of the original stock, the residue having been purchased to replace that sold and to increase the stock. The store being kept closed by appellant and Wm. Shively until the 19th of October, the officer holding said execution could not levy until that time. The levy was then made on about \$600 worth of goods and the same taken away, whereupon appellant brought this suit in replevin.

There is no question as to the *bona fides* of the mortgage debts. Both mortgages, however, were invalid as to purchasers and execution creditors, for the reason that the mortgagees knew, not only when the mortgages were given on the stock of goods that they would continue to be sold at retail, but that the mortgagor so continued thereafter to sell them. *Reed v. Wilson*, 22 Ill. 377; *Barnett v. Fergus*, 51 Ill. 352; *Herschle v. Morris*, 131 Ill. 587.

If, however, possession is taken before the rights of third parties accrue, then such mortgagees can hold the property. *Reed v. Wilson*, 22 Ill. 377.

Such a mortgage is not of itself a fraudulent conveyance of property, in the absence of a fraudulent intent. *Rhode v. Matthin*, 35 Ill. App. 149, 150; *Barnet v. Fergus*, 51 Ill. 352. It is a fraud in law on the part of the mortgagee in permitting the mortgagor to so make sales by retail. A chattel mortgage fraudulent in law as to third parties, is good as between the parties to it, as where it is not properly acknowledged or recorded. *Chipron v. Feihert*, 68 Ill. 284; *Gaar, Scott & Co. v. Hurd*, 92 Ill. 315; *Webber v. Mackey, Nisbet & Co.*, 31 Ill. App. 377; *Giffert v. Wilson*, 18 Ill. App. 214.

Possession was taken under the mortgages several days before the execution, under which the appellee made his levy, was issued; such possession, however, was of the entire stock of goods, though the undisputed evidence is that at least one-half of such stock, and we think much more, was new goods, purchased after the giving of appellant's mortgage. The mortgages did not provide for including subsequently acquired stock. This is essential as between the parties. *Jones on Chattel Mortgages*, Sec. 167. Such a stipulation is an executory agreement of such a character that the creditor with whom it is made may, under it, take the property into his possession when it comes into existence, and hold it for his security, and whenever he does so take it into his possession, before any attachment or other lien has been made of the same, such creditor, under his executory agreement, may hold the same. *Gregg v. Sanford*, 24 Ill. 17-20.

In the case of *Con. Tank Line Co. v. Collier*, 148 Ill. p. 264, it is said: "It is the settled rule in this State that a valid mortgage may be given on personal property not owned by the mortgagor and not then in existence, if he afterward acquires it;" but it is not good as against creditors or purchasers as to such property until possession is taken of it by mortgagee. *Gettings v. Nelson*, 86 Ill. 591;

Titus v. Mabee, 25 Ill. p. 260. And then, as heretofore stated, the mortgage must in terms cover such property.

The evidence is clear that appellant did not take or retain possession of the goods by virtue of any agreement with Thomas Shively, outside of the mortgages. In answer to questions propounded by the court, appellant stated twice that he took the goods under the mortgages and also stated he was proceeding to sell them thereunder when the levy was made. The appellee, the sheriff, in addition to the usual pleas, pleaded property in Thomas Shively and justified under his execution, which was issued to collect a judgment confessed for goods sold after the execution of appellant's mortgage. "On such an issue the substantial matter in dispute is the right of the plaintiff to the property. The plaintiff holds the affirmative of the issue and must sustain his right or fail in the action." *Anderson v. Talcott*, 1 Gilm. 371; *Atkins v. Byrnes*, 71 Ill. 326. The burden of the proof was, therefore, on the plaintiff, appellant, to show that he was entitled to the immediate possession of the identical goods replevied. See, also, Sec. 94, *Wells on Replevin*. He only had the right to the possession of those goods, in any event, that were included in the mortgages at the time of their execution, as heretofore shown. There is no evidence to show they could not be identified. If they could not be, the confusion was by the mortgagee's consent and therefore he could not claim the entire stock. The evidence is undisputed that Shively had a good trade and sold a great many goods. Doubtless a large part of the original goods had been sold. How much, if any, of the old goods were levied upon, the evidence does not disclose. It was for the appellant to show the fact, in view of the evidence and the issues in this case. In the case of *Schemerhorn v. Mitchell*, 15 Ill. App. 418, very like this one in its facts and issues, it was held the execution would hold the property.

The judgment is affirmed.

**Melvin T. Stone et al. v. Missouri Guarantee Savings
and Building Association.**

1. **MASTER'S SALES**—*When to be en Masse.*—It is the duty of the master to sell property so as to procure the most money with the least injury to the mortgagors, and if this can not be done by a sale in separate parcels, the property may be sold *en masse*.

2. **SAME**—*Sales en Masse, When Set Aside.*—It is only on the ground of fraud, or that some one has been injured by the sale of parcels of land *en masse*, that the sale will be set aside in chancery.

Foreclosure, sale.—Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

STATEMENT OF THE CASE.

This was a proceeding by bill in chancery exhibited by appellee, to foreclose a mortgage of real estate, executed and acknowledged by Stone and wife to secure certain indebtedness of Stone to appellee. A hearing was had and a decree was entered, finding the amount of indebtedness from Melvin T. Stone due and unpaid to be \$5,157.46, and ordering the master in chancery to advertise and sell the real estate mortgaged in case of default in the payment as decreed, or so much thereof as might be necessary to realize the amount so due complainant, together with the costs and disbursements connected therewith, and providing the property might be sold separately if the same could be done without material injury to the parties interested. The mortgaged premises consisted of two blocks of suburban property, divided into lots. One entire block of forty lots, block 54, and thirty-nine lots of the other block, block 55, were subject to the mortgage lien.

In pursuance of the decree, the master made the sale and filed his report thereof, to which report James T. McCasland Leo Scherrer, John P. Enright, Alex Abend and L. W. Reid, the first of whom only was a party to the suit, claiming to be bidders and purchasers at the sale, filed these exceptions:

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"1st. That the law requires said premises, as set forth in said decree and publication, to be sold in parcels, and not *en masse*. 2d. That said master did sell said lots in single lots and they were bid on and purchased by the above named parties as set forth in said master's report; that all of said purchasers were in good faith and in the presence of the mortgagee and their agents and attorneys; that said purchasers demanded certificates of purchase and were able and willing and offered to pay the price bid and so sold; that said certificate was wrongfully issued to one not the purchaser at said sale. 3d. That the master in chancery erred in issuing certificate to Missouri Guarantee Savings and Building Ass'n, and in not issuing to the above named parties as per their bid in said report; and that said master exceeded his authority in selling said property the second time."

The exceptions were overruled and master's report was approved, to all of which the persons excepting, excepted and prayed and were allowed to take this appeal. The master's report shows that he advertised the sale as required by the decree; that, in pursuance of the decree and in conformity with the notice of sale, he did, on January 5, 1894, offer for sale at public auction at the front door of the court house in the city of Belleville, in said county, the said premises ordered to be sold; first proclaiming the terms of sale, as set forth in the decree, and first offering said lots for sale separately, subject to sale *en masse*. Next sets out in detail the lots that were offered for sale separately, the amount bid for each, and the name of bidder to whom each was struck off, showing that every lot in each block ordered to be sold was offered separately; that the highest bid was twenty dollars for any one lot and that was on two lots only; that fifteen dollars was next highest bid and for one lot only that McCasland bid one dollar each for eight lots and two dollars each for twenty-eight lots; that no bids were offered for either of two lots, and the aggregate amount of the bids for which the lots were struck off when offered separately was but \$263. The master then offered *en masse* all the

lots in block 54 ordered to be sold, and Reid bid therefor \$5,000, and they were struck off to him at that sum, which was not enough by over \$800 to pay the debt, interest, costs and other expenses. He then offered *en masse* all of block 55 ordered to be sold and could get no bid. He then offered both of said blocks *en masse* and complainant bid \$5,880.22, being the highest and best bid therefor, and the same was sold to it for that amount and the master's certificate was delivered.

J. W. BARTHOLOMEW, attorney for appellants.

CAMPBELL & RYAN and J. J. RAFTER, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Appellants do not claim the debt secured by the mortgages was not due and payable and amounted to the sum found due by the court, nor that the mortgagors were not liable to pay the same as decreed; nor that the property when sold *en masse* brought less than its full value. No claim is made of fraud or inadequacy of the price for which the master sold it, but it is claimed the statutory provision requiring real property taken on execution to be sold in separate parcels, if susceptible of division, was violated, to the injury of those who made such grossly inadequate bids, and to the injury of Stone by not giving those bidders certificates and thus permitting him to redeem by paying a sum sufficient to satisfy the costs of suit and necessary expenses of making the sale. These bidders were notified before bidding of the right reserved by the master to sell *en masse*, if the rights of the parties required it, and they bid subject to that condition. It was the duty of the master to so sell the property as to procure the most money with the least injury to the mortgagors. This he could not do by selling in separate parcels, but when sold together it brought enough to pay the debt, interest, costs and all expenses. None of the parties were injured thereby. The mortgage

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was paid in full by the proceeds of the sale and the debtors discharged from the burden of the debt. It is only on the ground of fraud, or that some one has been injured by the sale of several parcels or tracts of land *en masse* that the sale will be set aside in chancery. *Ross v. Meek et al.*, 5 Gil. 171; *Gillespie v. Smith et al.*, 29 Ill. 473; *Prather v. Hill*, 36 Ill. 402; *Fergus v. Woodworth*, 44 Ill. 378; *Martin v. Hargardine*, 46 Ill. 322; *Hay v. Baugh*, 77 Ill. 500; *Fairman v. Peck*, 87 Ill. 156.

Counsel for appellant also suggests that the rule requiring a sale of lands under a decree to be made in the inverse order of alienation was not observed and therefore the sale ought to have been set aside. No case is made by this record warranting the application of this rule. *Dates v. Winstanly*, 53 Ill. App. Rep. 630. The master followed the directions of the decree in making the sale as he did, and acted for the best interest of the parties in so doing. The court did not err in refusing to set aside the sale. The order and decree of the Circuit Court is affirmed.

H. R. Searing v. Joseph White.

58	81
98	1440

1. TRIAL BY THE COURT—*Conclusive on the Facts.*—A trial by the court where the evidence is conflicting, and a finding of the facts, are conclusive.

Assumpsit, for goods sold. Appeal from the Circuit Court of Williamson County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

CLEMENS & WARDEE, attorneys for appellant.

HARTWELL, SPILLER & FOWLER, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.
The appellee recovered a judgment below for the value

of piling which he claimed to have furnished appellant. The latter claims he made the purchase of one Peterson, against whom he had a certain claim. The evidence discloses the fact that appellant and Peterson had been interested together in the purchase of chair timber, the former furnishing the money and the latter doing the buying. The appellant and Peterson had talked about buying piling, to which, at the time, appellant did not consent, but finally sent Peterson an order for some piling, at a price named. The latter saw appellee, and told him he could furnish it to Searing. White agreed to do so and did send the carload of piling. It was billed in Peterson's name, by Peterson. He was not directed to do so, however. Before the car was shipped, White saw Searing and told him that he was furnishing him one carload, to which Searing replied that was all right. When White asked for his pay, then Searing claimed he had purchased of Peterson and had a claim against him. Searing claims he did not know White in the transaction.

The questions involved in this case wholly relate to facts. No error of law is discussed. The case was tried before the court. While the evidence is somewhat contradictory and mixed, yet we think the evidence sustains the finding and judgment.

White evidently understood he was selling the piling directly to Searing. He so informed him before its delivery. If the evidence of White and Chamness was believed, Searing assented to that statement.

Searing knew Peterson had no money and had not been buying on his own account. They had been operating together. Peterson had been trying to get him to purchase piling, and when the order was sent might well have thought he had concluded to adopt the suggestion made. Peterson explains why the piling was sent in his name instead of Searing's or White's name. While such explanation is not very satisfactory, yet it may have been to the court below. Substantial justice has been done, and the judgment is affirmed.

**Illinois Central Railroad Company v. Frank Pummill,
Administrator, etc.**

1. **EVIDENCE—Where No One Witnessed the Death.**—In action for damages sustained by the death of a kinsman from negligence where no one saw the accident causing the death occur, and the cause and manner of such death is established by surrounding circumstances on the trial, evidence that the deceased was habitually prudent, cautious and temperate is admissible for the jury to consider, together with the instinct of self-preservation which a sane person is presumed to possess, in determining whether the deceased was exercising care for his personal safety.

2. **INSTRUCTIONS—Diligence by Deceased to be Informed as to Condition of Appliances.**—In an action for damages occasioned by the death of a kinsman from negligence in failing to keep appliances in safe repair, an instruction which ignores the duty of the deceased to exercise reasonable diligence to inform himself of the condition of such appliances, is erroneous.

3. **RAILROAD COMPANIES—When Not Liable for Personal Injuries.**—A railroad company will not be held liable for injury to its servant in the course of his employment when such injury results from his neglect to perform his duty, the performance of which might have avoided the accident.

4. **SAME—Employee to Use Diligence—Defective Appliances.**—If an employe is in constant use of an appliance, with an opportunity to know by the exercise of reasonable diligence of its defective condition, he is bound to use that diligence and not use the defective appliance but report its condition to the company.

5. **DUE CARE—Evidence of the Exercise of—Deceased Persons.**—The law does not require positive proof of the exercise of due care and diligence in ascertaining the condition of appliances by the servant. In case of death, the fact may be inferred from circumstances in evidence, where no one saw the accident.

Trespass on the Case.—Death from negligence. In the Circuit Court of Fayette County; the Hon. JACOB FAUKE, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict for plaintiff; appeal by defendant. Heard in this court at the August term, 1894. Reversed and remanded. Opinion filed March 23, 1895.

FARMER, BROWN & TURNER, attorneys for appellant;
JAMES FENTRESS, of counsel.

HENRY & GUINN, attorneys for appellee.

MR JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Plaintiff's intestate was a brakeman in the employ of appellant at the time of his death, which occurred in January, 1893. He was then acting as head brakeman on appellant's freight train which left Centralia about 11 o'clock P. M., January 30th, and on its way north stopped at Vandalia about 1 o'clock A. M. of January 31st. At that point the deceased was ordered by the conductor in charge of the train, to assist in switching the car next the engine, from the main track to a side track west of it, by the method known as a "drop" or "running switch." Deceased was on the engine, and obeying the direction given him, it became his duty to pull the coupling pin out of the link holding the car and engine together, then signal the engineer that the car was uncoupled, which he did, and get on top of the car to be set out, set the brake on it, and stop it on the side track. In attempting to get on the car, as there is evidence to show, he fell from it with his head close to the rail, and the top of his skull was crushed and his instant death, resulted. This suit was brought by the administrator of his estate, under the statute, to recover damages for his death, averred in the declaration to have been caused by the negligence of appellant in placing the said freight car in the train, with the ladder, upon which brakemen could climb with feet and hands upon and off said car, so out of repair, and the rungs thereof so mashed in, that no foot or hand hold was afforded its servants, handling said car to climb upon or off said car. Avers defendant's knowledge, and want of knowledge of deceased of such defective condition of the ladder; the order of conductor to deceased to assist in setting out said car; that deceased in obedience to said order uncoupled said car from the engine, and while in the exercise of due care for his own safety, attempted to climb upon said car, and that by reason of the defective condition of said ladder, he slipped and fell and was run over by said car and killed. The jury found defendant guilty and assessed plaintiff's damages at \$2,000. Defendant's motion for a new trial was overruled and judgment

was entered on the verdict for the damages assessed and costs of suit, and defendant took this appeal.

In the view we take of this case, we deem it unnecessary to notice all the points set forth as grounds for reversal, but will confine ourselves to the consideration of those most material. One of these is, that the court erred in admitting improper testimony on behalf of appellee to show that deceased was an industrious, sober and prudent man. In this kind of case, where no one actually saw how the accident occurred, and the cause and manner of it is established by surrounding circumstances proven on the trial, evidence that deceased was habitually prudent, cautious and temperate, is admissible for the jury to consider, together with the instinct of self-preservation which a sane person is presumed to possess, in determining whether he was exercising care for his personal safety. *C., R. I. & P. Ry. Co. v. Clark*, 108 Ill. 117; *I. C. R. R. Co. v. Nowicki*, 148 Ill. 34. In the latter case it is said: "Proof that deceased was a sober, industrious man is admissible, where there was no eye witness to the killing, as tending to show he was in the exercise of due care. The court did not err in admitting the evidence objected to. The evidence to show that plaintiff and the family of deceased were dependent upon the labor of defendant for support, objected to by defendant, was excluded by the court, and the jury were told to pay no attention to it. The error, if any, was thus cured."

It is also urged that the court erred in making some remarks, while passing upon an objection made to a question asked on behalf of appellant. We have examined the record and discover no serious objection to the remarks complained of. It is also insisted that the evidence fails to show the death of plaintiff's intestate resulted from the negligence of defendant, as charged in either count of the declaration, or that deceased was in the exercise of due care for his personal safety, as therein averred. As this case is to be again tried, we refrain from commenting upon the evidence, further than to say there was direct and circumstantial evidence tending to prove the cause of action as averred in the dec-

laration, and as to the material fact that deceased was exercising reasonable care as averred, the evidence was conflicting. But in our judgment the court erred in giving the jury certain instructions on behalf of plaintiff, calculated to mislead the jury, to the prejudice of defendant.

In the second, third, eighth, ninth, tenth, eleventh and fourteenth instructions given for plaintiff, and in each of them, the jury are informed the plaintiff had the right to recover if deceased was a brakeman on defendant's freight train, in which defendant put a box freight car that had a defective rung in the ladder, by which deceased, in the discharge of his duty, would have to ascend said car, and if, by reason of said defect, while performing such duty and in the exercise of due care and caution for his own safety, deceased attempted to climb upon said car by means of said defective ladder, and by reason of such defect fell from said car and was run over and killed, provided defendant had notice of said defect, or might have known it by the exercise of a reasonable degree of diligence, and further believe that deceased did not know of the defect in the ladder. In each of these instructions, the duty of deceased to exercise reasonable diligence to inform himself of the condition of the ladder is ignored, and that of defendant is fully set forth. The jury would therefore have understood the law to be that a servant was not required to exercise any care or diligence to ascertain the condition of machinery, tools or appliances he was necessarily required to use, in performing the work he contracted to perform. This is not the law. The relative and reciprocal duties of master and servant have been defined and announced in repeated decisions of our Supreme Court in cases like this, and are quite well known to the profession.

A railroad company will not be held liable for injury to its servant in the course of his employment, when such injury resulted from his neglect to perform his duty, the performance of which might have avoided the accident. I. C. R. R. Co. v. Jewel, Adm'x, 46 Ill. 99.

If an employee is in constant use of an appliance, with an

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opportunity to know, by the exercise of reasonable diligence, its defective condition, he is bound to use that diligence and not use the defective appliance, but report its condition to the company. *T. W. & W. Ry. Co. v. Eddy*, 72 Ill. 138; *C. & A. R. R. Co. v. Bragonier*, 119 Ill. 51; *O. & M. Ry. Co. v. Bass*, 36 Ill. App. Rep. 128.

The law does not require positive proof of the exercise of due care and diligence in this regard by the servant, but that may be inferred from certain circumstances in evidence where no one saw the accident. *Mo. Furnace Co. v. Abend*, 107 Ill. 48; *C., B. & Q. R. R. Co. v. Gregory*, 58 Ill. 272; *C. & N. W. R. R. Co. v. Jackson*, 55 Ill. 493. There was evidence, direct and circumstantial, tending to show that deceased did not exercise a reasonable care and diligence to ascertain the defective condition of the ladder he was required to use, but if the jury followed the rule announced in the instructions criticised, this omission by deceased to perform an imperative duty, and the evidence tending to prove such negligence would be regarded by them as wholly immaterial to the great prejudice of defendant. The giving of said instructions was an error, which requires us to reverse the judgment. The modification of defendant's ninth instruction and refusing to give the eighteenth and nineteenth instructions on its behalf was proper.

For the reasons given above the judgment is reversed and the cause remanded.

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William P. Reno v. Edward G. Mendenhall.

1. **LANDLORD AND TENANT—Covenants to Repair—Suit for Rent—Recoupment.**—Where there are no covenants in the lease on the part of the landlord to keep the buildings on the demised premises in repair he will not be liable to do so; but if the landlord has expressly covenanted to repair, the obligation will be enforced, and if he sues for rent the tenant may recoup any damage he has sustained by the breach of covenant.

2. *SAME—Covenants to Repair Before the Term Commences.*—If a landlord covenants to repair before the term commences, the tenant may refuse to enter upon the term until the repairs are made; but having entered upon the term and received possession, he can not abandon the lease and refuse to pay rent for the breach of the covenant to repair.

3. *SAME—Failure to Repair—Recoupment by Tenant.*—If the landlord covenants to repair, and fails, the tenant may recoup from the rent the amount of his damages or sue upon the covenant.

4. *SAME—Covenants to Repair—Loss by Fire.*—A covenant on the part of the lessor to repair includes the duty to rebuild in case of fire.

Action for Rent.—Appeal from the Circuit Court of Marion County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Submitted at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

HENRY C. GOODNOW, attorney for appellant.

APPELLEE'S BRIEF, KAGY & SMITH, ATTORNEYS.

The landlord is liable to his tenant for an injury resulting from a failure to keep the premises in a proper state of repair. *White v. Montgomery*, 58 Ga. 204; *Freidenburg v. Jones*, 63 Ga. 612; *Learoyd v. Godfrey*, 138 Mass. 315; *Nash v. Minneapolis*, etc., 24 Minn. 501; *Swords v. Edgar*, 59 N. Y. 28; *Cason v. Godley*, 26 Pa. St. 111; *Scott v. Simons*, 51 N. H. 426.

The legal effect of a covenant to keep the demised premises in repair, without reservation of loss by fire, binds the covenantor to restore the buildings, if damaged by fire, and even to rebuild the same, if burned. *Ely v. Ely et al.*, 80 Ill. 533; *Wiegall v. Waters*, 6 T. R. 488; *Pym v. Blackburn*, 3 Ves. 38; *Crocker v. Hill*, 61 N. H. 345; *Phillips v. Stevens*, 16 Mass. 238; *Leavett v. Fletcher*, 10 Allen (Mass.) 119; *Cline v. Black*, 4 McCord (S. Car.) 431; *Nave v. Berry*, 22 Ala. 382; *Abby v. Billups*, 35 Miss. 618; *Proctor v. Keith*, 12 B. Mon. (Ky.) 252-254; *Meyers v. Myrrell*, 57 Ga. 516, and *David v. Ryan*, 47 Iowa 642.

The breach of the covenants to repair and to keep in repair were such acts as to lessen and destroy the beneficial interests in the premises, and appellee could off-set or recoup his damages to appellant's action for rent. *Wade v. Halli-*

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gan, 16 Ill. 507; Berington v. Casey, 78 Ill. 317; Dyett v. Pendleton, 8 Cow. R. 727; Wright v. Lattan et al., 38 Ill. 293.

Rent ought to be abated when the beneficial use of the lease is destroyed. Brown v. Morris, 2 Bro. Ch. Ca. 311; 8 Bac. Abr., tit. Rent; Gilbert on Rents

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This was a suit by appellant brought to recover rent from appellee, averred to be due and unpaid under two leases for the same premises. The first lease, dated October 10, 1887, was for the term of five years, from March 1, 1888, to March 1, 1893, by the terms of which Reno, the lessor, agreed, among other things, to put the buildings in good repair. The second lease, dated 1891, was also for a term of five years, commencing March 1, 1893; the rent reserved in each lease was \$80 per annum, payable in installments of \$40 each, on July 1st and November 1st in each year; and by the second lease Reno covenanted to keep the buildings in good repair. Declaration was filed December 27, 1893. The defense set up in the several special pleas was, substantially, that plaintiff had failed to repair and to keep in repair the buildings on said premises, as he had covenanted to do; that on June 30, 1892, without fault or negligence of defendant, one three-story building on said premises was injured and damaged by fire, and one other frame building was thrown down, to prevent it from being burned by the fire from the three-story building; that said buildings were by plaintiff suffered to so remain from June 30, 1893, and defendant deprived of the use and enjoyment of them, to his injury and damage in the sum of \$200, which he offered to set off. The jury found for defendant. Plaintiff's motion for a new trial was overruled and judgment was entered on the verdict for costs. Thereupon plaintiff took this appeal.

It appears in evidence that under the first lease the appellee entered into possession of the demised premises, part of which were two buildings, one a frame building, the other a building with a brick basement and two stories of

frame. That on June 30, 1892, these two stories were destroyed by fire and also the doors and window frames of the basement, but otherwise the latter was intact and uninjured. The other frame building was pushed over to prevent it from being consumed by the same fire. Appellee, as to the land, continued in possession under the first lease after the fire, and under the second lease, which went into effect March 1, 1893, and still holds possession thereunder, but was deprived of the use of the buildings, because they were left in the same condition and were not repaired after the fire, although the agent of Reno was notified shortly afterward of the fire and injury to the property thereby occasioned. Appellee paid all the rent up to the time of the fire and testified he called the attention of plaintiff's agent to the repairs needed, and to the condition of the basement and chimney before the fire. This chimney was out of repair at the time the lessee entered into possession and the only repair upon it made by the lessor was outside the roof, which did not remedy its defective and dangerous condition. The evidence tended to show the fire was caused by this defective flue.

The unpaid rent sued for was \$55 under the first lease, and \$80, for one year, under the second lease. It was also shown that the frame house could have been set up and repaired, and so restored to the condition it was in before the fire, and the lessee notified plaintiff's agent he would be satisfied as to the other building if the basement was repaired and a roof put over it, so he could use it as he had done before the fire.

The lessee makes no claim for expense incurred for repairs made by him, but asked to be allowed the amount of damage he sustained by reason of his being deprived of the use of said buildings in consequence of the fire, caused by the breach of the covenant to repair and the breach of the covenant to keep in repair the said buildings.

This damage was shown by the evidence to be, at least, equal in amount to the unpaid rent sued for. Had there been no covenant by the landlord to put the buildings in repair and keep them in repair, he would not be liable under

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the evidence. Taylor's Land. & Ten., Sec. 327, and the cases cited in appellant's printed argument, would be in point. But if the landlord has expressly covenanted to repair, the obligation will be enforced, and if he sues for rent, the tenant may recoup any damages he has sustained by the landlord's breach of the agreement. *Id.*, 4th Ed., Sec. 331.

If a landlord covenants to repair before the term commences, the tenant might refuse to enter upon the term until the repairs are made, but having entered upon the term and received possession, he can not abandon the lease and refuse to pay rent for the breach of that covenant. If the landlord fails to repair according to covenant, the tenant may recoup from the rent the amount of his damages for the breach, or sue upon the covenant. *Wright v. Lattin*, 38 Ill. 293. We do not agree with counsel for appellant in their claim that the restoration of the small building to its condition before the fire, and putting a roof over the basement would not be repairs, but, even if their view be correct, it has been held that a covenant to repair on the part of the lessor, includes the duty to rebuild in case of loss or destruction by fire. *Crocker v. Hill*, 61 N. H. 345; *Leavett v. Fletcher*, 10 Allen (Mass.)

The ruling of the trial court, in modifying one of plaintiff's instructions and refusing to give certain others on his behalf, was not erroneous, but was in harmony with our views above expressed. Our judgment is that the verdict was sustained by the evidence, and the judgment entered was right. Judgment affirmed.

**In Re Voluntary Assignment of Richart & Campbell.
 Exceptions to Claim of J. G. & H. F.
 Campbell, as Adm'rs, etc.**

1. **ADMINISTRATORS—Conversion of Assets—Remedy.**—Where an administrator converts assets of the estate into money and uses the same the legal title thereto is vested in him, and the remedy for the recovery of such money by the creditors or distributees of the estate is by suit against him or upon the administrator's bond.

2. *SAME—Money Converted, Treated as Assets Administered.*—Assets of an estate converted by the administrator into money is treated as assets administered, and an administrator *de bonis non* can not maintain an action therefor upon the bond of the prior administrator who converted the same, but such prior administrator and his sureties are responsible to the creditors, distributors or heirs of the estate.

3. *TRUST FUNDS—When They Can Not be Reached.*—To maintain the right to reach and appropriate a fund or money as a trust fund it must not change its form and lose its identity as such, or be placed in such condition that it has no ear mark, signs or indication of its belonging to a specific trust.

4. *SAME—Assets Converted, Not Recoverable by the Estate.*—Where an administrator collects moneys of the estate and puts the same into a firm of which he is a member, such moneys cease to be assets of the estate, and are in no sense such a trust fund as can be recovered as a debt due the estate.

Ass'gnment for the Benefit of Creditors.—Claim against an insolvent firm. Appeal from the County Court of Jackson County; the Hon. M. C. CRAWFORD, County Judge of Union County, presiding. Submitted at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

I. CLEMENTS and R. J. STEPHENS, attorneys for appellants.

WM. W. CLEMENS and WM. A. SCHWARTZ, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

The claim in controversy was filed in said County Court on December 27, 1893, against the bankrupt estate of Richart & Campbell, as a claim due the administrators of the estate of J. M. Campbell, who died in 1871; and these appellants, H. F. and J. G. Campbell, then became such administrators. H. F. Campbell was a co-partner of Richart for many years, and so remained up to, and at the time, of its failure and assignment. Exceptions to this claim were filed at the February term, 1894, of said court, by creditors of the bankrupt firm, and at the following June term thereof the issue was submitted to a jury, who, by their verdict, found against said claim, and the court entered judgment on the finding against claimants for costs, and they took this appeal.

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It appears from the evidence that H. F. Campbell, as administrator, collected money due the estate at divers times, during a long period before 1893, and used it as his own, in the firm business of Richart & Campbell. It is not shown that Richart was informed the capital so put in the business by Campbell as his own money, came from the assets of his intestate's estate, nor does it appear that those who extended credit to the firm were in any manner advised that such was the fact. On the contrary, it appears by the evidence of H. F. Campbell, the only witness on behalf of claimants, that he did not keep any account of this money of the estate in the firm books, but in a little book in which was kept the account of the J. M. Campbell estate, showing the amount and time of receipt of each amount of estate assets collected, and in which book his co-administrator also made entries. Nor does it appear in any of the sworn reports of said administrators, from the date of their appointment, including their final report of April, 1890, filed in the County Court, that any indebtedness was charged or listed against the firm of Richart & Campbell; yet in these reports *all the assets* of the estate are included, according to the sworn statements of the appellants. Said firm continued business until August 22, 1893, and then made a general assignment of all the firm property to E. G. Mitchell, assignee, for the benefit of creditors.

The schedule of debts due creditors, as prepared and sworn to by appellant, H. F. Campbell, and his partner, did not contain any item of indebtedness to the estate of J. M. Campbell. Four months had elapsed after this assignment when, for the first time, was any claim made that the firm was indebted to said estate. We may add, also, it does not appear in this record that there are any other children or heirs of J. M. Campbell than the appellants, or that any of the debts of the estate remain unpaid. This record does not present a case where a *cestui que trust* is proceeding against his trustee, but the right to have this claim allowed is based upon the assumption that the money collected by H. F. Campbell as administrator, and by him put in as cap-

ital and so used in the regular mercantile business of Richart & Campbell, was still a trust fund and assets of the Campbell estate and could be recovered as such by the administrators of that estate. This assumption is erroneous. By the conversion of the assets into money and using the same the legal title thereto vested in Campbell, and the remedy for the recovery of such money by creditors or distributees is by suit against him or upon the administrator's bond. *Rowen v. Kirkpatrick*, 14 Ill. 1; *Johnson v. Maples*, 49 Ill. 101; *Lacock v. Oleson*, 60 Ill. 30; *Newhall v. Turney*, 14 Ill. 338. If an administrator converts estate assets into money and uses the same, such action operates as *devastavit*, and the remedy is a suit upon his bond by those entitled to receive the same or a distributive share thereof after the payment of debts. Same authorities. Money so converted is treated as assets administered, and an administrator *de bonis non* can not maintain an action therefor upon the bond of the prior administrator who converted the same, but such prior administrator and his sureties are responsible to the creditors, distributees or heirs of the estate. *Stose v. People*, 25 Ill. 600; *Hanifan v. Needles*, 108 Ill. 403.

To maintain the right to reach and appropriate a fund, or money, as a trust fund, it must not change its form and lose its identity as such, or be placed in such condition that it has no ear marks, sign or indication of its belonging to a specific trust. *Howard v. Robinson*, 14 Ill. App. 560, citing *Williams, Adm'r, v. Williams*, 55 Wis. 300. Under the facts in this case, and the law applicable thereto, our opinion is, that the money collected by Campbell and put in said firm by him then ceased to be assets of the Campbell estate, and was in no sense a trust fund; nor can this claim to recover the same as a debt due the estate be maintained by the administrators thereof.

There was no privity of contract between said firm and the estate whereby a debt was created from the former to the latter, and it was not so regarded, as appears from the reports to the County Court before mentioned.

J. G. Campbell had access to the private book in which

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collections made by H. F. Campbell were entered, and is presumed to know how much thereof was unaccounted for and converted to the use of the latter, and acquiesced therein. He is liable for the acts of his co-administrator. *Marsh v. People*, 15 Ill. 284. We have refrained from commenting upon the iniquity of the said claim, or the injustice that would be done the creditors by allowing it and diminishing the fund out of which they are to receive dividends, deeming the discussion of this branch of the case superfluous. We perceive no error in the rulings of the court on the admission of evidence, and while some of the instructions objected to by appellants were erroneous, yet the error in this regard ought not to reverse the judgment, inasmuch as no right to recover the claim could be maintained under the undisputed facts proven. We think the claim was properly disallowed, and the judgment is affirmed.

Charles Becker and Bernhard Yoch, Receivers, v. A. J. Vandegrift.

1. **CONTRACTS—*Compensation Fixed by Letter.***—When one of the parties to a contract has, by his letter to the other, fixed the measure of the compensation to be made, such letter is proper to be considered in determining the amount due from such party.

Intervening Petition for Mechanic's Lien.—Error to the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Submitted at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

DILL & SCHAEFER, attorneys for plaintiffs in error.

TURNER & HOLDER, attorneys for defendant in error.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

At the April term, 1893, of the Circuit Court of St. Clair County, there was pending in that court a bill in chancery for the appointment of a receiver and for other relief, in

which Fielding W. Oliver was complainant, and the Belleville Steel Company was defendant. By leave of court, Andrew J. Vandegrift, defendant in error, filed an intervening petition in said cause, on June 30, 1893, whereby he sought to enforce a mechanic's lien against the receivers of the Belleville Steel Company. Answers to the intervening petition were filed by the Belleville Steel Company and by the plaintiffs in error and the proceeding was heard by the court upon oral and documentary evidence. A decree was rendered in Vandegrift's favor for \$484.53. Plaintiffs in error bring the record to this court and insist that the decree should be reversed. The only question presented for consideration by the argument of plaintiffs in error relates to the sufficiency of the evidence to show that they are indebted to Vandegrift in the sum of \$484.53, or in any other sum.

The findings of the decree are substantially as follows: That on August 17, 1892, Vandegrift and the Belleville Steel Company entered into a written contract, whereby Vandegrift agreed to make the necessary changes in the 22x30 Smith & Beggs piston valve engine, in a certain mill of the Belleville Steel Company, for the successful application of his late improved automatic cut-off piston valve and valve gear, and to furnish and apply the same, in complete running order, to said engine, and to guarantee a satisfactory running motion and as good economy as had been attained by the application of the same to the Tudor Iron Works; that the consideration to be paid Vandegrift for said appliances and attachments was to be the value of the fuel saved thereby for three hundred running days, of twenty-four hours each, payment thereof to be made monthly; that the Belleville Steel Company was to note the number of days run in each month, and to continue said payments until the three hundred days had been completed; that the amount saved was to be determined by running tests made before and after the application of said attachments to the engine, such tests to be continued for one week in each instance, under the same conditions; that in each test the amount of fuel consumed and of the tonnage

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turned out was to be recorded; that Vandegrift was to keep said attachments in complete repair for a term of two years after they were applied to the engine; that in pursuance of said contract, Vandegrift made the changes and applied the attachments on or about September 1, 1892; that before this was done, however, a test was made, as was provided for in said contract; that afterward, in March, 1893, another test was made, this time with the said automatic apparatus attached to the engine; that the Belleville Steel Company kept a record of said tests, and adopted the same as a basis upon which to fix Vandegrift's compensation; that the said tests showed a saving in fuel of \$5.21 per day; that on April 26, 1893, by its letter to Vandegrift, the Belleville Steel Company promised to pay Vandegrift for said appliances, in monthly payments, the sum of \$5.21 for each running day for a period of three hundred days, beginning with March 1, 1893; that after March 1, 1893, and prior to June 30, 1893, the date of the filing of Vandegrift's claim, the Belleville Steel Company operated said engine and mill for ninety-three days; and that no payment under the contract has been made to Vandegrift by the Belleville Steel Company or by the plaintiffs in error.

A careful examination of the record satisfies us that the chancellor was justified in finding the facts to be substantially as set forth and detailed in the decree.

An effort was made to show that the letter dated April 26, 1893 (which was in answer to a letter from defendant in error dated April 15, 1893, containing a comparative statement of the two tests made), was given by the manager of the Belleville Steel Company for the sole purpose of showing that Vandegrift's appliances were in use in that company's mill, and of thereby enabling said Vandegrift to contract for the use of the same appliances by other companies. The evidence upon this question was conflicting and the chancellor was certainly justified in holding that this letter was made with a more serious intent than that of enabling Vandegrift to impose upon ignorant and unsuspecting parties what plaintiffs in error claim to be a valueless contrivance.

But the letter in question speaks for itself. It is as follows: "Comparing the tests made on our 12-inch mill engine before and after the application of your automatic cut-off, we note a saving of coal to amount \$5.21 per day, which by terms of contract is payable to you monthly, covering a period of 300 running days, as per understanding of yesterday. March 1, 1893, is the time these payments date from. As then explained to you, we can not render you a voucher until May 10th, as that is the next nearest date on which we render vouchers on our treasurer for bills on hand."

It is difficult to determine whether the words "as per understanding of yesterday" are intended to qualify what precedes or what follows them. But this matter is not very material. Whether the "understanding of yesterday" was as to the amount saved daily and the number of running days to be paid for, or as to the time from which the payments were to be dated, a compromise of the differences between the parties, based upon a sufficient consideration, is shown by this letter, when considered in connection with the letter of defendant in error above mentioned, in which the latter agrees to accept \$28.68 as the saving for five and a half days. These two letters amounted to a contract between the parties, which the chancellor very properly enforced.

If there was not a "good, satisfactory running motion," as guaranteed by the defendant in error, the Belleville Steel Company should not have made the compromise shown by its said letter, which is dated nearly eight months after the appliances of defendant in error had been in use under the original contract.

This compromise also dispenses with the necessity of proof that as "good economy" was attained at the Belleville Steel Company's mill as by the use of the same appliance at the Tudor Iron Works, or that the attachments had been kept in repair as required by the original contract.

The decree of the Circuit Court is supported by the evidence, and it is therefore affirmed.

W. P. Habberton et al. v. S. L. Habberton.

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1. **SOLICITOR'S FEES**—*In Partition Cases*.—Under the statute, a solicitor's fee in partition proceedings can not be apportioned among the parties if the bill or petition does not properly set forth the rights and interests of all the parties, or if one or more of the defendants interpose a good and substantial defense.

2. **SAME**—*Amendment of Bill or Petition*.—Where a bill does not properly state the interests of the parties, and such insufficiency is brought to the attention of the court without the intervention of the defendants, the complainant may amend the bill so as to set forth the interests of the parties correctly, and thereby become entitled to an apportionment of the solicitor's fees the same as if the bill had been correct in the first instance; but when the defendants are forced by reason of the insufficiency of the bill to employ counsel to represent them, and the complainant is compelled, through the efforts of such counsel, to amend, it would be inequitable to apportion such fees among the parties.

3. **SAME**—*When to be Apportioned*.—The statute (Sec. 40, Ch. 107, R. S.), contemplates an apportionment of solicitor's fees in those cases only in which it is not necessary for the defendants to employ counsel to protect their rights. But where there is no necessity for the employment of counsel by the defendants, the complainant can not be deprived of the right to have the solicitor's fees apportioned simply because counsel are employed, or even because they may file an answer or otherwise appear in the case.

4. **DECREES**—*Clerical Omissions—Where Not Fatal*.—Where the intention of a decree can be clearly ascertained by reading the whole of it together, it will be held sufficient; so held, where a decree for solicitor's fees in a partition suit, in the order directing the clerk to tax the same as a part of the costs, omitted the word, "dollars," but where the findings of the decree clearly showed that "dollars" was intended.

5. **SAME**—*Creating Liens Construed*.—Where a decree for partition provided that a solicitor's fee should be apportioned among the parties and that they pay the same in accordance with their respective interests in the premises as found by the decree, and that said sum be a lien upon the lands in the decree, it was held that the decree did not make the whole fee a lien on every interest in the land partitioned, but that each party should pay a portion of the same, corresponding to his interest in the land, and that the lien created was upon his interest only for the part of the fee he was ordered to pay.

6. **SAME**—*Signature of the Judge*.—The signature of the judge is not necessary to the validity of a decree.

Partition of Real Property.—Appeal from a decree allowing solicitor's fees in partition. Entered by the Circuit Court of Wabash County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

MUNDY & ORGAN, attorneys for appellants.

CREIGHTON & KRAMER, attorneys for appellee.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Wabash County, allowing a solicitor's fee of \$450 in favor of appellee's (complainant's) solicitor, William T. Bonham, in a suit by appellee against appellants for the partition of certain real estate. Appellants insist that the Circuit Court erred in allowing this fee, and in apportioning the same among the owners of the real estate partitioned.

Under the statute, the solicitor's fee in partition proceedings shall not be apportioned among the parties, if the bill or petition does not properly set forth the rights and interests of all the parties, or if one or more of the defendants shall interpose a good and substantial defense.

Consider a case in which no good and substantial defense is interposed, but in which the interests of the parties are not properly stated in the bill. The insufficiency of the bill must be brought to the knowledge of the court either with or without the suggestion of the defendants. If this is done without the intervention of the defendants, there is no good reason why the complainant may not amend the bill so as to set forth the interests of the parties correctly, and thereby become entitled to an apportionment of the solicitor's fee as if the bill had been correct in the first instance.

If, however, the defendants are forced by the insufficiency of the bill to employ counsel to represent them, and the complainant is forced to amend through the efforts of counsel thus employed by the defendants, it would be manifestly inequitable to apportion the complainant's solicitor's fee among the parties. The statute contemplates an apportionment in those cases only in which it is not necessary for the defendants to employ counsel to protect their rights. But where there is no necessity for the employment of counsel

by the defendants, the complainant can not be deprived of a right given by the statute because counsel are, in fact, employed, or even because they may file an answer and otherwise appear in the case.

In the case at bar there was absolutely no good and substantial defense. Appellants and appellee agreed as to the interests of the parties, and as to the particulars of the decree of partition. They agreed that the alien descendants of the deceased could not inherit any part of the land. Appellants only were interested in this point, for appellee's share of the land would have been the same whether the aliens were regarded as heirs or not.

The only reason, therefore, which could have been urged against the apportionment of the solicitor's fee among the parties was that the bill, as originally filed, did not properly set forth the rights and interests of the parties. This objection was removed by amendment, however, and the chancellor very properly found, under the evidence, that the filing of an answer by appellants was unnecessary. Prior to the commencement of the term at which appellants appeared, appellee's solicitor had notified the solicitors for appellants that he would amend the bill so as to show that the alien descendants of the deceased had no interest in the land. This is the point in which it is claimed that the bill did not correctly state the rights and interests of the parties. If, under such circumstances, the defendants could file an answer, and thus prevent the allowance of the solicitor's fee, when the complainant's solicitor was there ready to file the necessary amendments, the nullification of the statute would certainly become an easy matter. The findings of the decree in this case are justified by the evidence, and are sufficient to authorize the allowance of a solicitor's fee of \$450, and the apportionment of the same among the parties in interest.

It is said that the decree erroneously makes the whole fee a lien on every interest in the land partitioned.

The language of the decree upon this point is as follows: "That the parties hereto pay the sum in accordance with

their respective interests in the premises as found by the decree of this court entered herein at the April term, 1893, said sum to be a lien upon the lands in this decree."

This provision of the decree means no more than that each party shall pay a portion of the solicitor's fee corresponding to his interest in the land, and that there shall be a lien upon his interest for the part of the fee he is thus ordered to pay. Certainly, under this language, any party, upon paying his proportion of the fee, would hold his part of the land discharged of the lien of the decree.

It is also said that the decree is void because of the omission of the word "dollars" after the words "four hundred and fifty." This part of the decree is as follows: "That the services of William T. Bonham, as solicitor in procuring said partition to be made, were reasonably worth the sum of four hundred and fifty dollars. It is therefore ordered, adjudged and decreed by the court that a solicitor's fee of four hundred and fifty be taxed as part of the costs of this suit."

So surely does the context show that the word "dollars" should follow "four hundred and fifty" in this decree, that appellants' counsel have inadvertently inserted the omitted word in the appropriate place in their abstract.

If the decree had read that such or said solicitor's fee should be taxed, the reference to the four hundred and fifty dollars in the finding would have made the decree sufficiently definite. But the statement that a solicitor's fee of four hundred and fifty should be taxed, is surely so connected with the finding as to show what was intended. Where the intention can be clearly ascertained by reading the whole decree together, the decree will be held to be sufficient. *Hafferbert et al. v. Klinkhardt*, 58 Ill. 450; *Noyes v. McLafflin*, 62 Ill. 474; *Mason et al. v. Patterson et al.*, 74 Ill. 191, and *Nowak v. Excelsior Stone Co.*, 78 Ill. 307.

It is contended that the fee should have been allowed to the firm of Bunch & Bonham, and not to the latter individually. Inasmuch as the finding of the chancellor is sustained by the evidence, and Bunch is not here complaining of the decree, there is no error in this respect which demands the reversal or modification of the decree.

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It is suggested that the decree was not signed by the judge. But the decree is of record and has not been impeached in any proper manner for fraud or mistake, and the signature of the judge is not necessary to its validity. *Dunning et al. v. Dunning et al.*, 37 Ill. 306; *Agnew v. Lichten et al.*, 19 Bradw. 79.

There being no prejudicial error in the record, the decree of the Circuit Court is affirmed.

Trustees of Schools v. Joshua Arnold.

1. **OFFICIAL BONDS**—*When an Officer Succeeds Himself.*—If an officer succeeds himself, the second bond is liable for what he had in his hands at the end of the first term. The fact that he succeeds himself does not extend the obligation of the first bond, although no report was made at the close of the preceding term.

2. **SAME**—*Condition, When Satisfied.*—The obligation of an official bond is discharged on the payment by the officer to his successor and the faithful performance of the duties of his office.

3. **HOMESTEADS**—*Mortgages upon in 1865.*—Under a mortgage made in January, 1865, when a homestead was not an estate, a foreclosure and sale carried the fee to the purchaser, subject to the homestead right.

4. **TRUSTEES OF SCHOOLS**—*Right to Purchase at Foreclosure Sale.*—Under Sec. 35, Art. 3, Ch. 122, R. S., entitled "Schools," the trustees of schools have the right to buy in the premises at a sale made in proceedings to foreclose a mortgage taken by them thereon for school moneys loaned.

5. **STATUTE OF LIMITATIONS**—*Suits Against Township Treasurers for School Funds.*—The trustees of schools in an action against a township treasurer for the recovery of school funds are not barred by the statute of limitations.

6. **SAME**—*Where it Does Not Apply.*—Where the liability of the defendant is created, not merely by the act of the parties but by the positive requirements of a statute, the plaintiff is not barred by the statute of limitations.

7. **SAME**—*Funds Held in Trust.*—So long as the duties of a trustee remain undischarged, he can not avail himself of the statute of limitations for his defense to an action for the recovery of such funds, unless the trust is openly denied to the knowledge of the *cestui que trust*.

Debt on an official bond against the principal alone. In the Circuit Court of Fayette County; the Hon. JACOB FOUKE, Judge, presiding.

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The pleadings are stated in the opinion of the court. Trial by the court and finding and judgment for defendant; error by plaintiff. Heard in this court at the August term, 1894. Reversed and remanded. Opinion filed March 23, 1895.

JOHN A. BINGHAM and WOOD BROTHERS, attorneys for plaintiffs in error.

J. G. WILLS and FARMER, BROWN & TURNER, attorneys for defendant in error.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This suit was brought against the defendant in error alone, on his official bond as school treasurer, executed December 6, 1863. There are five special counts in the declaration and also common counts in debt for money had and received.

The first special count merely alleges in general terms a failure to faithfully perform official duty; the second avers the execution of said bond at the time stated, and that defendant "has been from thenceforth hitherto, and during all said time continued in said office of school treasurer of said town, until April, 1888, having been re-appointed and qualifying, as prescribed by law, every two years thereafter; that during said time and all of said years, there came to the hands of said town treasurer large sums of money, arising from the various sources common to such funds, a large portion 'of which' stating the amounts defendant failed to account for and pay over; the third count avers a loss to the school fund, by reason of the failure of defendant to take sufficient security on a loan of \$121, made January 26, 1865; the fourth and fifth counts assign various breaches, among others, a failure to pay over to his successor money, etc., which successor was appointed and qualified April 10, 1888.

This suit was brought to the September term, 1889. To the declaration entire the defendant filed various pleas, among others, the pleas of the statute of limitations of five

and sixteen years, and of tender of \$35. A demurrer was sustained to the pleas of the statute and the case went to trial before the court on the other issues. After the evidence for the plaintiff was all introduced, the court, on the motion of defendant, set aside the former order sustaining said demurrer and re-instated said pleas, to which plaintiff excepted and stood by its demurrer, whereupon all the evidence except the bond was excluded, and the court gave judgment for the plaintiff on the plea of tender in the sum of \$35.

The errors assigned and discussed relate wholly to the said order of the court, there being no oral evidence incorporated in the record.

The plaintiff in error insists the statute of limitations does not apply to this action, for the reasons, 1, that it is the agent of the State; 2, that *laches* is not imputable to it; 3, that the fund sought to be recovered is a trust fund; 4, that a public right is involved.

The defendant insists, 1st, that a private and not a public right is involved; 2d, that the statute runs against corporations such as the plaintiff; 3d, that at law, though the fund is held in trust, the statute applies. The respective views are ably presented, and it seems the law of limitations, as applicable to a suit on such a bond, is not regarded as settled in this State, as two circuit judges held in this case the statute did not apply, and one held that it did.

There is a feature of this case that has not been discussed.

The averment that defendant qualified, as required by law, every two years, on being re-appointed, is equivalent to an averment that he executed a new bond each term of office.

The bond then sued on covered defalcations for the period of two years, for which the defendant was appointed (*Ladd v. Trustees*, 80 Ill. 233), and no longer. *Murfree on O. Bonds*, Sec. 88. If an officer succeeds himself, the second bond is liable for what he had in his hands at the end of the first term. 78 Ill. 394. The accidental circumstance that he succeeds himself does not extend the obligation of the first bond.

Murfree on Official Bonds, Secs. 218, 219, 220. He is presumed to have the money on hand when the second bond is executed. *Id.* 219; Brandt on Suretyship, Sec. 467; *Kagy v. Trustees of Schools*, 68 Ill. 75. This is the law, though no report was made at the close of preceding term 19. Ill. App. 24. The obligation of the bond itself was satisfied by payment to successor and faithful performance of the duties of the office. Murfree, Sec. 88, and cases cited.

There is no specific averment in the declaration, except in the third count; that charges a violation of the obligation of such bond within the first two years, and that relates to the making of a loan of \$121 on a homestead without taking a release of the homestead. It is averred that this sum and the interest was lost thereby. It is, however, also there averred the mortgage was foreclosed and the property bought in by the trustees, or defendant for them, for the debt and costs. The mortgage was made in January, 1865, when a homestead was not an estate, and a foreclosure and sale carried the fee to the purchaser, subject to the homestead right. *Young v. Graff*, 28 Ill. 20; *McDonald v. Crandall*, 43 Ill. 231, 236. The trustees had the right to make this purchase. Sec. 35, Art. 3, Chap. 122. Therefore, under the averments, there was no loss as to that loan if the trustees recognized such purchase.

The declaration in the special count seems to be framed on the theory that the bond sued on December 6, 1863, covered all defaults up to April 10, 1888, when defendant's successor was appointed. This is not correct for the reasons stated. The declaration, may, however, have been good after judgment, to have been the basis for the recovery of funds of any kind, permanent or distributive, that come to defendant's hands.

There are averments to show that he received both kinds of funds, and as defendant has treated the declaration as sufficient to raise the question on the error assigned, we will do so. Defendant's counsel concede the statute of limitations can not be pleaded to bar a public right, a public fund, or school funds strictly belonging to the State. We hold

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the permanent fund is a State fund, under the authority of *Greenleaf v. Township Trustees*, 12 Ill. 237; *City of Chicago v. People*, 80 Ill. 384; *People v. Trustees of Schools*, 118 Ill. 52-54, wherein it is said, "The State is the real owner of the fund to be held in trust for the purposes of the grant." The other cases are equally explicit. What is true of the principal, is also of the interest or profits of the same. As is said in 80 Ill. *supra*, "The State is virtually a trustee of the fund for the use of the people, and the municipalities and officers are but the agencies employed by the State in executing the trust." "Public school property and funds do virtually and in fact, although not in form, belong to the State." See, also, *Trustees v. Champaign County*, 76 Ill. 184.

There is more difficulty to determine the proper rule of law to apply to the distributive fund. The permanent fund is composed of the proceeds of the sale of section 16 and other funds, as provided by Sec. 6, Art. 12, Chap. 122, while the distributive fund is made up of the State or common school fund, money paid by the State—Secs. 1, 2, 3, Art. 12, Chap. 122; money raised by special tax on the district in the township—Sec. 1, Art. 8, Id., and interest on permanent fund—Sec. 6, Art. 12, and of fines and forfeitures belonging to the State, granted by law to the schools. This fund entire, except that raised by taxes, is really owned by the State and distributed by it to sustain our common school system. The township trustees and treasurer are its agents for this purpose.

The law provides, Sec. 34, Art. 3, Id., "The township board shall cause all moneys for the use of the township and districts to be paid over to the township treasurer, who is hereby constituted and declared to be the only lawful depository and custodian of all township and district school funds." This language indicates the purpose to charge him with a specific trust. It is not used with reference to any other involuntary corporate fund, so far as we are aware. It is a trust fund; so held in *School Directors v. School Directors*, 105 Ill. 653. It is appropriated to a specific purpose by law and until so devoted there is no authority to

divert it. In this sense it may be likened to public funds received by a county, to be paid over to a city; as in *Logan County v. City of Lincoln*, 81 Ill. 156, where it was held the statute of limitation did not apply, because the fund was, by law, appropriated to a specific public purpose, to be used by a named agency of the State, which public agency had not received the money, as provided by law; therefore a public right was involved. The same principle was applied in *Greenwood v. Town of La Salle*, 137 Ill. 225. There the town was held to be an agent to enforce a public right, so as to compel the payment of the fund to the agent authorized by public law to receive it. The fact that when received, the town or city, as in the *Logan county case*, *supra*, could dispose of it to any one of various uses prescribed by law) did not make the right to enforce such payment a private right. These cases seem to hold a public right is involved in every step necessary to be taken to secure to any public agency a public fund appropriated to its use. In the case in hand the school districts are the beneficiaries of the school fund, and it would seem, in view of the constitutional provision—Sec. 2, Art. 8—the trend and spirit of our school laws, the source from which a great part of the fund arises, that it was not intended the statute of limitations, applicable to any ordinary debt, should be applied to any part of such a trust fund (105 Ill. *supra*), until, as there held, it was paid out to the beneficiaries; for not until then, as in the *Logan county case*, has it reached its ultimate agent for appropriation. The trustees, or the treasurer for them, held this school fund for the ultimate agent, the school directors, just as certainly as *Logan county*, in the course of the law, held the fund it received for the city of *Lincoln*. The fact that one agent held the fund under the law, longer than the other, is immaterial as affecting the principle that a public right is involved, until the ultimate agent, authorized to appropriate it, receives it.

This doctrine, as we understand, rests upon the principle that has long been established, that “where the liability of the defendant is created, not merely by the act of the par-

ties, but by the positive requirements of a statute, the plaintiff is not barred" by the statute of limitations. Angell on Limitations, Sec. 2, p. 83; Wood on L., Sec. 3, p. 85; Burwell on Limitations, Sec. 148. It is said by Mr. Justice Story, "The whole theory and practice of political and civil obligations rests upon this principle." Angell on L., p. 84. It will be observed the township treasurer holds the distributive fund intact. Sec. 7, Art. 12, Chap. 122; Sec. 34, Art. 5, Id.; Sec. 27, Art. 3, Id. He can not loan any of such fund, except there is a surplus belonging to a school district, and then only on the order of the directors. Sec. 5, Art. 4, Id. The law prescribes (Sec. 2, Art. 4, Id.) how he shall separately keep an account of each fund. The statute does not give the trustees power to appropriate any part of such fund. They apportion the fund subject to distribution (Sec. 24, Art. 3) and examine securities (Sec. 30, Id.) and have care, custody and title to school houses and school house sites, which, of course, is held in trust. The liability of the defendant is clearly created by statute with reference to a specific fund, which is no broader than the liability of the bond within the time of its official life. *Glover v. Wilson*, 6 Penn. St. 290. This distributive fund is, as stated, except the money raised by taxation on the property of the school district, in fact, though not in form, the fund of the State, and, therefore, in a suit to recover it, the principle of *nullum tempus occurrit regi* would apply, *Catlet v. People*, 151 Ill., p. 23; to the residue, raised by taxation, the principle laid down in Angell on Limitations, and Logan county case, *supra*, would apply, or that of *School Directors v. School Directors*, 105 Ill., *supra*, that it is distinctly a trust fund created by appointment of law, in which case, as said in *Albrecht, Adm'r, v. Wolf, Adm'r*, 58 Ill., at p. 190, "The rule seems to be general and well settled by authority that so long as the duties of the trustee remain undischarged, the trustee can not avail of the statute of limitations for his defense," unless the trust is openly denied to the knowledge of the *cestui que trust*.

In the case of *State ex rel. v. Board Comm'rs of St. Joseph County*, 90 Ind. 359, the principle that all such fund—

the common, congressional, and that raised by taxation—is a trust fund, was applied to bar the running of the statute of limitations. Our Supreme Court has held the title to the congressional school fund was in the State, going further than the Indiana court, which held the title was in the township, in trust for the inhabitants. *State v. Newton*, 5 Blackf. 455; *State v. Springfield Township*, 6 Ind. 94, 95. That State has not held, however, as indicated in *Miller v. State*, 28 Ala. 600, that the statute of limitations will apply to such fund, because, as there held, the title was originally in the State in trust, and the State, by executing the trust by conveyance to the inhabitants, had divested itself of all interest.

No distinction has been made between a suit on the bond and a suit on a statutory liability, and we do not assume there is any, under the pleadings, in an action against the treasurer only. This court holds that, as to any school fund in the hands of the treasurer, the pleas of the statute of limitations were not well pleaded, and the court erred in setting aside the former order sustaining a demurrer thereto. The judgment is reversed and the cause remanded.

St. Louis, Alton & Terre Haute R. R. Co. v. Ben Ellis.

1. *RAILROADS—Liable for the Use of Property to the Damage of Another.*—Where a railroad company uses its property so as to injure another, it will be liable for the damage thereby occasioned.

2. *SPECIAL INTERROGATORIES—To Be Submitted in Time.*—It is not error to refuse to submit special interrogatories to the jury, which the party requesting has failed to submit to the opposite party as required by the statute.

3. *INSTRUCTIONS—Not Applicable to the Facts.*—It is not error to refuse an instruction which is not applicable to the facts relied on for a recovery.

Trespass on the Case, for obstructing a watercourse. Appeal from the Circuit Court of Williamson County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

St. L., A. & T. H. R. R. Co. v. Ellis.

CLEMENS & WARDER, attorneys for appellant.

DUNCAN & RHEA, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Appellee brought this suit to recover damages for the injury resulting from an overflow of water upon his premises, caused by the wrongful acts of appellant.

The jury found defendant guilty, and assessed the plaintiff's damages at \$300. Defendant's motion for a new trial was overruled, and judgment was entered for the sum so assessed and costs of suit. Defendant took this appeal. Appellee's premises were 286 feet in length, north and south, and 170 feet in width, east and west, and were situated about 100 feet north, and about the same distance west of a pond on the railroad premises, constructed by the Chicago, St. Louis & Paducah R. R. Co., in 1887, and appellant immediately thereafter entered into and continued in the possession and control of said pond and premises, and operated said railroad up to and at the time this suit was commenced. A creek, called the Cunningham branch, flows from the north, parallel with and about fifteen to twenty feet from the east side of the railroad pond, which is about five feet deep and seventy yards square. The dirt from the excavation was placed on the south, east and west sides of the pond. That placed on the south formed the railroad dump, and was five or six feet above the natural surface. The railroad track ran east and west. No bank was placed on the north side of the pond.

As originally constructed, this pond had a sewer or waterway in its southeast corner, to discharge the water into the branch when it reached a certain height in the pond.

After appellant took possession and control of the railroad and pond, it caused this sewer or outlet to be taken up, and filled in the space thus left with dirt, making a solid bank, thus preventing the flow of water out at the southeast corner, and also constructed a dam across the branch a short distance north of the northeast corner of the pond,

preventing the natural flow of water in the branch, and causing it to flow into the pond.

The jury were justified by the evidence in finding these obstructions were placed, as above stated, by the appellant. That during the high water in the spring of 1893, these obstructions caused a large quantity of water to back up and overflow a part of the premises of plaintiff, and damage and destroy his fruit trees and berry vines to an extent that warranted the assessment of the full amount of damages recovered. Hence, the contention of appellant that the evidence does not sustain the verdict is not tenable. In this connection we desire to say that the plat or sketch of the premises inserted in the printed argument on behalf of appellant does not appear in the record, and when examined by the light of the evidence is incorrect and defective.

The jury having rightly found that appellant obstructed the natural flow of the water, to the injury and damage of appellee, it follows that appellant violated that law which forbids a person to so use his own property as to injure another, and it became liable for the damage thereby occasioned. It is insisted, further, on behalf of appellant, that the court erred in refusing to require the jury to return special findings, in answer to two interrogatories, as requested by defendant.

Aside from the objection that these questions involved evidentiary and not ultimate facts, it does not appear they were submitted by defendant to the plaintiff, as required by the statute, and the court did not err in refusing to submit them to the jury. The objection is also made that the court refused to give the following instruction on behalf of defendant below:

"The court instructs the jury that if they believe from the evidence that the defendant in this case did not construct the earthworks or embankments, grades or levees, that occasioned the overflow or damage to the plaintiff's lands and vegetation growing thereon (if the jury should believe there has been any damage done by any embankments or levees), but such construction of the embankments,

City of Flora v. Utterback.

etc., was by another corporation, which has leased such works to the present defendant after they were so constructed, then the plaintiff can not recover against the defendant in this case, unless he shows by a preponderance of the evidence that prior to the date of the injury complained of, he notified the defendant to remove such embankments or levees."

This instruction was not applicable to the facts relied on for recovery, and was, therefore, properly refused. It was not the construction of the earthworks, embankments, grades or levees that was relied on to charge the defendant, but the averment that it "changed, dammed and turned a certain stream along said pond and into said pond, and prevented the said stream from draining said waters in their usual way and course," as averred in the declaration, and thereby caused the overflow, injury and damage. We might add, also, that the jury were fully informed by the instructions for plaintiff that the damage must have been occasioned by the defendant to entitle plaintiff to recover. No error is perceived in the rulings of the court complained of. The judgment is affirmed.

City of Flora v. Ida B. Utterback.

1. **CITIES AND VILLAGES—Verdicts—When Conclusive as to Negligence.**—When the verdict of a jury upon a question of negligence is justified by the evidence, it is conclusive.

Trespass on the Case, for negligence in maintaining a bridge. Appeal from the Circuit Court of Clay County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

GERSHOM A. HOFF and ALONZO HOFF, attorneys for appellant.

HAGLE & SHRINER, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover damages for personal injuries to appellee, resulting from the negligence of appellant in maintaining a bridge in an unsafe and dangerous condition over a ditch in a public street of the corporation. The jury found defendant guilty, and assessed plaintiff's damages at \$100. Defendant's motion for a new trial was overruled, and judgment was entered for the damages assessed and costs of suit. Defendant thereupon took this appeal.

No question of law is presented in the argument, but we are asked to reverse the judgment upon the ground that the verdict is not warranted by the evidence. An examination of the record satisfies us the jury were justified by the evidence in finding defendant guilty of the negligence charged, causing the injury complained of, and that plaintiff was not guilty of any contributory negligence barring her recovery. The judgment is affirmed.

56 114/
58 117/

John Weisenborn et al. v. The People of the State of Illinois, use of, etc.

1. SURETIES—*Liability on Official Bonds*.—The sureties upon the official bond of an officer conditioned for the faithful performance of the duties of an office, are liable for the performance of all duties imposed upon him, and which come within the scope of his office.

Debt on an official bond. Appeal from a judgment on demurrer rendered by the Circuit Court of Monroe County; the Hon. GEORGE W. WALL, Judge, presiding. Submitted at the August term, 1894. Affirmed. Opinion filed March 28, 1895.

TURNER & HOLDER and RICKERT & GAUEN, attorneys for appellants.

WILLIAM WINKELMAN, attorney for appellees.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

This was an action of debt on the official bond of John Weisenborn, as clerk of the Circuit Court of Monroe County, for the term beginning in December, 1884, and ending in December, 1888. The amended declaration duly avers Weisenborn's election as circuit clerk, and the execution and acknowledgment of the bond by Weisenborn and the other appellants; also the approval of the bond by the circuit judge, as required by law, and the filing thereof in the office of the secretary of state. It is also averred that Weisenborn filed with the secretary of state, the oath of office required by law and was thereupon duly commissioned by the governor as circuit clerk, and assumed the duties of such office during the term aforesaid. It is further alleged that said bond obligated said Weisenborn to faithfully perform all duties required, or to be required, of him by law, and to pay over all moneys which might come to his hands by virtue of his said office, to the parties entitled thereto, and to deliver up all moneys, papers, books, records and other things appertaining to his office, whole, safe and undefaced, when lawfully required so to do. It is further alleged that said Weisenborn did not faithfully discharge all the duties required of him by law, but that, on the contrary, he neglected and refused so to do, to the injury of Monroe county. The breach assigned is, that on divers days during said Weisenborn's term of office, fees earned by the sheriff in serving process of the Circuit Court of Monroe County, were paid to said Weisenborn, and that at the expiration of his term of office, said fees so collected remained in Weisenborn's hands, and that the same have never been paid to the treasurer of Monroe county, or to the plaintiff for the use of said treasurer.

The declaration further shows that a full settlement was made with the said sheriff on the first Monday of December, 1886, at which time the sheriff's salary and clerk's hire were paid to him in full, and that, by reason of such settlement, the treasurer of the county became entitled to all the

sheriff's fees collected by said Weisenborn during his term of office aforesaid. The declaration alleges a request by plaintiff for the moneys for which this suit was brought.

To this declaration appellants filed a demurrer, both general and special. The demurrer was overruled, and appellants having elected to stand by their demurrer, judgment was rendered for appellee for \$5,000 debt, and \$712 damages and costs of suit, the judgment to be satisfied upon the payment of the damages. Thereupon appellants perfected an appeal to this court.

The real question involved in this case relates to the liability of the sureties on the clerk's official bond, for his failure to pay over, at the expiration of his term of office, to the county treasurer, such fees earned by the sheriff as may have been collected by the clerk, and to which the sheriff may not be entitled by reason of a full settlement of his affairs with the county.

We deem it unnecessary to enter again into a discussion of this question, which was carefully considered by this court in the recent case of *Weisenborn et al. v. The People*, 52 Ill. App. 32.

We adhere to the views of the law announced in that opinion and refer all persons interested to that case for our reasons for affirming the judgment in the case at bar. We hold that, in such a case as is presented by the declaration in the record before us, the sureties on the clerk's official bond are liable.

The judgment is affirmed.

John Weisenborn et al. v. The People of the State of Illinois, use of, etc.

1. This Case follows the preceding one. Appeal from the Circuit Court of Monroe County; the Hon. GEORGE W. WALL, Judge, presiding. Affirmed. Opinion filed March 23, 1895.

TURNER & HOLDER and RICKERT & GAUEN, attorneys for appellants.

WILLIAM WINKELMAN, attorney for appellees.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

This case is identical in all essential particulars with another case entitled *Weisenborn et al. v. The People*, decided at the present term of this court, except as to the clerk's term of office, which in this case was from 1888 to 1892, and except as to the amount of damages recovered, which in this case was the sum of \$165.75. The demurrer to the declaration was properly overruled. See the opinion in the case above referred to and also the opinion in the case of *Weisenborn et al. v. The People*, 53 Ill. App. 32, where our views of the law are fully expressed. The judgment is affirmed.

Illinois Central Railroad Company v. Wm. H. Sanders.

1. **INSTRUCTIONS—Where the Evidence is Conflicting.**—Where the issues are contested and the evidence conflicting, extreme care is required in instructing the jury as to the law.

2. **SAME—Plaintiff Must Inform Himself of His Surroundings.**—An instruction which practically tells the jury that the plaintiff had a right to shut his eyes and refuse to inform himself as to the condition of the track and the nature of his surroundings, notwithstanding the fact he may have had ample opportunity for investigation or even for acquiring a true knowledge of the situation by ordinary observation without any effort at investigation, is erroneous.

3. **SAME—Liability of Master—Information of Servant.**—An instruction which, in effect, informs the jury that a master is liable even though the servant may have had such information of his surroundings as would have put a reasonably prudent man on his guard, provided that information did not amount to full information, or, as the average juror would understand the language, to absolute certainty, is erroneous.

4. **SAME—Error in One Instruction Not Always Cured by Others.**—Where the evidence is conflicting and the balance doubtful, an instruction, erroneously assuming a fact in issue, is not cured by other instructions which assume that the question is still open.

5. **MASTER AND SERVANT—Duty of the Servant as to His Surroundings.**—The rule that the servant is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings,

58	117
66	441
58	117
69	235
166a	277

etc., in the absence of notice of defects is not applicable to the case of one who has been in the employment of his master for such a length of time as to require him, in the exercise of ordinary prudence, to take some notice of his surroundings.

6. RECORD—*When it Does Not Contain All the Instructions Given.*—When the record does not contain all the given instructions, yet, if instructions given and preserved contain errors which could not have been cured by others, it is proper to reverse the judgment because of the giving of such erroneous instructions.

Trespass on the Case, for personal injuries. Appeal from a judgment of the Circuit Court of Marion County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Submitted at the August term, 1894. Reversed and remanded. Opinion filed March 23, 1895.

GREEN & GILBERT, attorneys for appellant; W. and E. L. STOKER, of counsel.

SAMUEL L. DWIGHT and FRANK F. NOLEMAN, attorneys for appellee.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellee, aged twenty-six years, was an experienced brakeman and switchman, and had been working for appellant for two or three years. He began work on the "run" between Effingham and Centralia, on February 2d or 3d, 1892, and received the injuries sued for while attempting to make a coupling at Edgewood on February 22d, of the same year. The freight train on which he was working during this period of time, left Centralia about 6:30 A. M., and made the run to Effingham and back by 5:30 P. M., according to the schedule, but an hour or more later according to the fact, the delay arising from the large amount of work required of this train, which consisted not only in receiving and delivering freight, but also in switching and placing cars at ten or eleven stations where there was no local switch engine. The train was required to keep out of the way of all other trains running on scheduled time. The Ohio and Mississippi road crossed appellant's road just south of Edgewood, and the two roads,

for mutual convenience in transferring freight, were connected by a "Y." Besides the main track, appellant had here a "pass" track and a "house" track.

When the train in question, proceeding south, arrived at Edgewood at three or four o'clock in the afternoon of February 22d, and surmounted and began to descend the elevation about one mile north of the station, arrangements were made to cut the train into two parts and throw two cars on the "Y." This was done, and the rear part of the train, consisting of four cars and a caboose, was left standing on the main track with the south car over what is denominated by the witnesses a cattle-guard. There was no highway here and the so-called cattle-guard was in the nature of trestle work over a small ravine or depression eight feet in width.

The engine and such cars as were still attached thereto, proceeded toward the south. Some switching was done there, and then the engine and cars were backed up the main track to be coupled to the rear part of the train. The two cars to be coupled together belonged to different roads, and the draw-bar of one was higher than that of the other, thus rendering the coupling somewhat difficult under certain circumstances. The pin was bent and this increased the difficulty.

Appellee, who was on the north car of the south part of the train, descended to the west side of the car to make the coupling. He moved along the side of the car till the moment came for him to perfect the junction, and then, with his left foot on the outside of the rail and his right foot on the inside, endeavored to walk along with the moving cars after they had bumped together, and to force the crooked pin into its place. He claims that his left foot was caught under one of the ties, that his right foot went into the cattle-guard, that it was impossible to release his left foot in time for the withdrawal of the right, that the moving car struck him in the back and threw him forward, that he turned over in his effort to extricate himself, and that his right leg was run over and crushed. On the trial

of the case two propositions were hotly contested, the first relating to the negligence of appellee, and the second to the negligence of appellant.

Appellee claimed that he was in the exercise of ordinary care for his safety, while appellant made the contrary claim. Appellee claimed that his left foot became caught under the tie and his right foot went into the cattle-guard, because of the condition of the track, which was not reasonably safe according to his contention, while appellant claimed that the track was in a reasonably safe condition. As to each of these propositions, the evidence was conflicting. In fact the case was a close one in every particular, and extreme care was required in instructing the jury as to the law.

The following is the first instruction given at appellee's request: "You are further instructed that the business of furnishing reasonably safe machinery, appliances, surroundings, etc., is upon the master; and while the master is not to be held liable for dangers and defects of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings, etc., in the absence of notice that there is something wrong in that respect. And where the performance of the servant's duties requires constancy of attention to other matters, he has a right, and is entitled to assume that his master has furnished him with suitable and reasonably safe materials, machinery and surroundings, and relieved him, the servant, of investigation and inquiry in that regard."

This instruction might be a correct statement of the law in some cases, but in the case under consideration it was certainly calculated to mislead the jury.

Appellee had made at least thirty-six runs over this part of the road, and was charged, under the rules of the company, with the duty of informing himself as to the track on which he was to work, and as to the dangers incident to this part of the service. And yet this instruction practically told

the jury that appellee had a right to shut his eyes and refuse to inform himself as to the condition of the track and the nature of his surroundings, notwithstanding the fact that he may have had ample opportunity for investigation, or even for acquiring a true knowledge of the situation by ordinary observation without any effort at investigation. A switchman might indeed not be "*fully informed*" of certain dangers and defects, and yet he might have such information as would put a reasonable man upon inquiry, or render an ordinarily prudent man cautious enough to avoid danger and injury under the circumstances. Yet this instruction told the jury that the master was not liable for dangers and defects of which the servant was "*fully informed*," which amounted to a statement that the converse of the proposition was true, that is to say, that the master was liable even though the servant may have had such information as would have put a reasonably prudent man on his guard, provided that information did not amount to *full information*, or, as the average juror would understand the language, to *absolute certainty*.

It may be also properly observed that the statement that the servant is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings, etc., in the absence of notice of defects, is very good law in a proper case. This proposition is not applicable, however, to the case of one who has been in the employment of his master for such a length of time as to require him, in the exercise of ordinary prudence, to take some notice of his surroundings.

A man can not decline to see, and then hold the master liable, excusing his own negligence by saying that he was under no primary obligation to investigate. We do not mean to intimate that such was actually the conduct of appellee in this case, but simply to affirm that he can not excuse negligence, if guilty thereof, on this ground, and that the jury should not have been precluded by the instruction in question from passing freely upon this branch of the case.

In a case where the conflict of the evidence is so sharp as

it is here, the error in giving this instruction can not be said to be cured by the instructions given for appellant.

It is said in the argument, however, that the record and abstract do not "purport to set forth all the instructions asked or given," and that it is to be presumed that other instructions were given which cured the error in appellee's instruction.

The cases cited in support of this proposition are cases in which the record shows affirmatively that instructions given are not contained in the record. An inspection of the record before us discloses the fact that it contains three instructions given for appellee, and ten instructions given, and one refused on the other side. The statements of the record are such as to lead the mind to the conclusion that these are all of the instructions which the court was requested to give.

But if the rule which requires the record to show affirmatively that it contains all of the evidence is to be applied to the instructions, it is certain that well recognized exceptions modify the rule in the latter case.

In one case cited by appellee, *Meyer v. Temme*, 72 Ill. 574, it is held that, even if the record does not contain all of the given instructions, yet if instructions given and preserved in the record contain errors which could not have been cured by others, it would be proper to reverse because of the giving of such erroneous instructions.

This case is directly in point. The error in the giving of appellee's first instruction was not cured by instructions given, or which might be presumed to have been given, for appellant.

True enough is it that the instructions in a case must be considered as a single charge, and that, in many instances, an erroneous statement in one part of the charge may be cured or corrected by another part of the charge. But such is not the law under all circumstances.

Error in assuming a fact in issue is not cured by other instructions which assume that the question is still open. *Bressler v. Schwertferger*, 15 Bradw. 294. Such is the law also where the evidence is conflicting, and the balance is

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doubtful. *Town of Geneva v. Peterson et al.*, 21 Ill. App. 454. See, also, as clearly announcing the same doctrine the following cases decided by the Supreme Court: *C. & A. R. Co. v. Murray*, 62 Ill. 326; *T., W. & W. Ry. Co. v. Lannon*, 67 Ill. 68; *Quinn v. Donovan*, 85 Ill. 194; *Wabash R. R. Co. v. Henks*, 91 Ill. 406; *W., St. L. & P. Ry. Co. v. Rector*, 104 Ill. 296.

For the errors indicated the judgment is reversed and the cause is remanded.

Commodore A. Combs v. Hamlin Wizard Oil Company.

1. **INJUNCTIONS—Collection of Judgments.**—Before equity will interfere to enjoin the collection of a judgment at law, it must not only be made to appear that the judgment was rendered without the fault or negligence of the party seeking relief, but also that there is a good and sufficient defense to the suit, so that upon a re-trial of the case the result would be different.

2. **JUDGMENTS—Where Defendant is Not Served with Process.**—Even though a defendant has not been served with process, yet he should not be relieved in equity if the judgment is altogether just.

3. **PRACTICE—Service upon Agents.**—When service of summons is made upon an agent of the defendant in cases where such service is authorized, the principal is liable for the consequences of the agent's negligence in not giving information of such service.

4. **SAME—Service after the Agency has Ceased.**—Service upon a person who has been in the employment of a corporation as its agent, but after his employment as such has ceased, is not sufficient.

5. **AGENCY—When Principal Estopped to Deny.**—When a corporation has suffered a person to hold himself out to the public as its agent, so as to render it inequitable for the apparent agency to be denied, service of process upon such agent will be sufficient.

6. **AGENT—An Independent Contractor is Not—Service of Process.**—An independent contractor with a corporation is not an agent of the corporation in the sense that legal process against the corporation may be served upon him.

Injunction, to restrain the collection of a judgment. Appeal from a decree of the Circuit Court of Marion County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1894. **Affirmed.** Opinion filed March 23, 1895.

APPELLANT'S BRIEF, FRANK F. NOLEMAN AND S. L. DWIGHT,
ATTORNEYS.

Power to act generally in a particular business, or course of trade in a business, however limited, will constitute a general agency, if the agent is so held out to the world, however restricted his private instructions may be. *Crain et al. v. National Bank*, 114 Ill. 516.

A person openly and notoriously exercising the functions of a particular agency of a corporation, will be presumed to have sufficient authority from the corporation to so act. *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455.

Corporations can only act by agents, and the law presumes authority in persons who are permitted to act for them.

APPELLEE'S BRIEF, W. F. BUNDY, ATTORNEY.

The rule distinguishing an independent contractor from an agent or servant may be stated as follows:

One who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely in accordance with his own ideas or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor and not a servant; and a person injured by his negligence in its performance would have no right of action against the party for whose benefit the work is done.

The rule has also been stated in this manner:

When a person contracts with another exercising an independent employment or calling and hiring his own servants to do a work, not in itself a nuisance, according to the contractor's own methods and not subject to the control or order of the person for whose benefit the work is done, except as to results to be obtained, the former is not liable for the wrongful acts of such contractor or his servants. 14 *Am. & Eng. Ency. Law*, 830; *Scammon et al. v. City of Chicago*, 25 Ill. 424; *West v. St. L. & V. T. H. R. R. Co.*, 63 Ill. 545; *Prairie State L. & T. Co. v. Doig et al.*, 70 Ill. 53; *Hale*

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v. Johnson, 80 Ill. 185; Shearman & Redfield on Neg. (2d Ed.), 92, Sec. 76; Arasmith v. Temple, 11 Brad. 36; Bailey v. T. & B. R. R. Co., 57 Vt. 252; Wadsworth H. Co. v. Foster, 50 Ill. App. 513; Wharton on Neg., Sec. 181; Cooley on Torts, 519; 2 Hilliard on Torts, 537; Addison on Torts, 580; Cincinnati v. Stone, 5 Ohio St. 38; Smith v. Spitz, 31 N. E. Rep. 5; 156 Mass. 319; State v. Swayze, 52 N. J. L. (23 Vroom) 129; Moline v. McKinnie, 30 Ill. App. 419; Cuff, Admx. v. N. & N. Y. R. R. Co., 35 N. J. L. (6 Vroom) 17; Pfau v. Williamson, 63 Ill. 16; Kepperly v. Ramsden, 83 Ill. 354; Chi. City Ry. Co. v. Hennessy, 16 Ill. App. 153; Village of Jefferson v. Chapman, 127 Ill. 444; Alexander v. Mandeville, 33 Ill. App. 598; Mechem on Agency, Sec. 747.

Unless appellee was served with process in the suit at law; in some manner pointed out by the statute, the judgment in that case is void for that reason. The sending of a copy of the summons through the mail is not service of process as contemplated by the statute, and the appellee was not required to respond to such a notice. Kingman & Co. v. Mann, 36 Ill. App. 342.

In cases where the judgment which it is sought to enjoin is void for want of jurisdiction arising from the want of service of process upon defendant, the courts have manifested less reluctance in granting the desired relief than in other classes of cases. Nor is it necessary to show that defendant in the judgment had a good defense to the action, since, the judgment being void, no presumptions will be indulged in favor of the judgment creditor. High on Inj. (2d Ed.), Sec. 229.

The fact that a person is paid by the day, or month, does not necessarily destroy the independent character of his employment. Mechem on Agency, Sec. 747.

Agency can not be proved by the mere declarations of the alleged agent. Proctor v. Towns, 115 Ill. 138; Mulphany Bank v. Schott, 135 Ill. 655; 1 Am. & Eng. Ency. Law, 351.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

The bill in this case was filed by appellee to enjoin the

collection of a judgment at law for \$3,000, rendered by default against appellee and in favor of appellant. The bill alleged that appellee was not served with process in the suit at law, and that it was not indebted to appellant equitably or otherwise. A temporary injunction was granted, and upon the hearing of the cause this injunction was made perpetual.

The decree of the Circuit Court can be sustained only upon the theory that appellee was not in fact served with process, and that appellant had no just cause of action against appellee. Before equity will interfere to enjoin the collection of a judgment at law, it must not only be made to appear that the judgment was rendered without the fault or negligence of the party seeking relief, but also that there is a good and sufficient defense to the suit, so that upon a re-trial of the case the result would be different. Even though a defendant has not been served with process, yet he should not be relieved in equity, if the judgment is altogether just. *Owens v. Ranstead*, 22 Ill. 161; *Weaver v. Poyer et al.*, 70 Ill. 567; *Higgins v. Bullock*, 73 Ill. 205; *Blackburn et al. v. Bell*, 91 Ill. 434; *Lemon et al. v. Sweeney*, 6 Bradw. 507.

Both questions, the first relating to the service of process and the second to the equity of the judgment, may be considered together, inasmuch as they turn alike upon the point whether or not one N. T. Oliver was the agent or servant of appellee after May 2, 1892. If Oliver was such agent, then appellee was duly served by the delivery to the agent of a copy of the summons, and was liable for the consequences of its agent's negligent act. If Oliver was not such agent, then appellee was not served with process, and the judgment is wholly inequitable.

The proper consideration of this question necessitates a brief statement of the facts which appear in the record.

Appellee was incorporated in 1891, for the manufacture and sale of Wizard Oil and certain other panaceas for the "ills that flesh is heir to," and was engaged in that philanthropic and lucrative enterprise in the spring of 1892. N. T. Oliver, sometimes called Dr. Oliver, was and had been

for many years a professional advertiser of patent medicines. When fully equipped with assistants and paraphernalia, he seems to have been charmingly irresistible to the diseased multitude, often selling in one week 150 bottles of patent medicines at \$1 per bottle, and realizing during a single evening \$40 in ten cent installments from the sale of seats to those who attended his evening entertainments.

Dr. Oliver was not unmindful of those whose legs were abler than their pocket books. Such could enjoy the intellectual feast "without money and without price," if they were willing to stand outside of the space occupied by the chairs provided for the moneyed and aristocratic part of the audience.

The entertainments were usually held in the tent when the weather was agreeable, and in a hall in winter. Under favorable circumstances, the audience numbered from one to two thousand.

The programme was varied, consisting of flirtations, music and eloquent speech. There were solos, duets and quartettes. Dr. Oliver discoursed upon the excellency of his medicines. The hours passed rapidly away, and the doctor and his audience separated, highly pleased with the result of the evening's entertainment. The doctor chinked his cash, and his suffering patient hopefully pressed his bottle of patent medicine to his stomach. Well, the courts would not have been interested in these particulars, but for the fact that Dr. Oliver's band, when parading the streets of Centralia, on May 5, 1892, and discoursing sweet music to the listening crowd as an advertisement of the evening's entertainment, unfortunately frightened appellant's horse, as a result of which appellant was seriously injured.

Thereupon appellant sued appellee and caused the summons to be served on Dr. Oliver, as appellee's agent. Appellee, considering the manner of service, determined that it was not in court, and suffered judgment to be rendered by default in appellant's favor. An execution for the collection of the judgment having been sent to the sheriff of Cook county, where appellee's offices and effects were, this bill was filed to enjoin the collection of the judgment.

The relationship of Dr. Oliver to appellee is divided into two periods—that which preceded and that which followed May 2, 1892, on which day Oliver and appellee entered into a written contract, as the final agreement resulting from certain negotiations by letter, whereby Oliver was to advertise appellee's nostrums, with his concert company, and by the distribution and posting of printed matter, appellee not to be responsible for "any of the salaries or other expenses of any kind incurred by said N. T. Oliver in conducting his business." Oliver's compensation was to consist of such quantity of goods as he might sell up to a limit of \$150 in any week, with certain other stipulations which are not material to the point under consideration. The negotiations by letter above mentioned related to an increase of Oliver's salary and of the salaries of certain of his assistants, which appellee refused to grant. Oliver finally proposed to hire and pay his men and run the business on his own responsibility for a certain compensation, and this offer was accepted in the written agreement which took effect on May 2d.

Under this contract, Oliver was an independent contractor, and the business not being unlawful, or a nuisance *per se*, or necessarily dangerous, appellee was not responsible for Oliver's negligent act, and could not be brought into court by the leaving of a copy of the summons with Oliver, as its agent. *Mechem on Agency*, Sec. 747; *Scammon et al. v. The City of Chicago*, 25 Ill. 424; *West v. St. L., V. & T. H. R. R. Co.*, 63 Ill. 545; *Prairie State L. & T. Co. v. Doig et al.*, 70 Ill. 52; *Hale et al. v. Johnson*, 80 Ill. 185; *Ara-smith v. Temple*, 11 Bradw. 39; *Wadsworth Howland Co. v. Foster*, 50 Ill. App. 513.

The last case cited, and *Kingman & Co. v. Mann et al.*, 36 Ill. App. 338, are particularly instructive as to the questions under consideration. If it be granted that prior to the 2d day of May, Oliver had been appellee's agent, it is certain that the actual agency terminated at that time. If appellee is to be held responsible for Oliver's act after May 2d, it must be upon the theory that the relationship, known to

have once existed, is presumed to have been continued for a reasonable time as to those dealing with appellee, without notice of the change of relationship created by the new contract. But the accident occurred at Centralia, and there is no evidence to show that the citizens of that city, where work was begun by Oliver as an independent contractor, had any knowledge of the prior course of business, or of any statements on the subject of agency made at other localities. The work at Centralia was wholly disconnected from prior work at other points, and no one at that city could have been misled to his injury into thinking an agency existed, when such was not the fact, unless appellee suffered Oliver to hold himself out to the citizens of Centralia as such agent so as to render it inequitable for the apparent agency to be denied.

There was a conflict of the evidence upon this question. The testimony was given orally before the chancellor, who had a better opportunity than a court of review to determine what weight should be given to the testimony of each witness. Besides, the evidence shows that appellee's officers had no knowledge of the fact that Oliver was representing himself as appellee's agent. They knew that he had no right to do so under the existing contract, and had a right to suppose that he would not transcend the limits of his power.

It is also worthy of notice that this is not a case where a fraud has been practiced under cover of a supposed agency, or where a contract has been made upon the supposition, justified by circumstances, that one is the agent of another. In such a case, the party complaining may have been induced by the apparent agency to act as he would not have done under other circumstances, and so as to be injured if the doctrine of estoppel should not be applied.

In the case at bar the injury would have been suffered by appellant whether Oliver was the agent of appellee or not. He was riding along one of the streets of Centralia, and the band frightened his horse. Would he have walked or remained at home, if he had thought Oliver was an independent

contractor? Under these circumstances, where the evidence shows that there was no actual agency, it would be flagrantly unjust to hold appellee responsible for the negligence of Dr. Oliver, because of an inference of agency drawn from a few statements and acts which were not known to appellee and have deceived no one except, perhaps, an occasional purchaser of a bottle of patent medicine.

We think that Oliver was not appellee's agent, in fact or in law, either when the injury was sustained or when service of process was attempted. Therefore the decree of the Circuit Court is affirmed.

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77	69
58	180
115	114

Illinois Central Railroad Company v. Levi Hobbs.

1. **BURDEN OF PROOF—Action for Personal Injuries.**—In actions for personal injuries, the law requires the plaintiff to show that the defendant has been guilty of doing something which a person of ordinary care would not do, or of omitting to do something which a person of ordinary care would do.

2. **NEGLIGENCE—Not Presumed.**—Negligence is not presumed merely because there has been an accident, if what has been done or omitted was in the usual course of such matters, and was not in itself improper.

3. **SAME—The Proper Inquiry.**—In actions for negligence the inquiry is not whether the accident might have been avoided if it had been anticipated, but whether, under all the circumstances, it was negligence not to anticipate and provide against its occurrence, in the exercise of ordinary prudence.

4. **SAME—Accidents, etc.**—In cases where negligence is not apparent, injuries resulting are classed as accidental. As a general rule, where an appliance, such as a platform, not obviously dangerous, has been in daily use for years and has uniformly proved adequate and safe, it may be continued without the imputation of negligence.

Trespass on the Case, for personal injuries. Appeal from a judgment of the Circuit Court of Effingham County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1894. Reversed and remanded. Opinion filed March 28, 1895.

APPELLANT'S BRIEF, WILLIAM H. GREEN AND WOOD BROTHERS, ATTORNEYS.

"From the earliest reported case in our reports, where the question was passed upon, to the present time, a period

of more than thirty years, the general rule has been declared, and recognized in opinions announced from time to time, that in order to recover for injuries from negligence, it must be alleged and proved that the party injured was, at the time he was injured, observing due or ordinary care for his personal safety." *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358.

The court cites forty-three cases in the body of the opinion to uphold the above doctrine.

APPELLEE'S BRIEF, E. N. RINEHART AND S. F. GILMORE,
ATTORNEYS.

It is the duty of railroad companies to provide platforms or other conveniences at their passenger stations for the purpose of enabling passengers to enter upon and depart from the cars with convenience and safety. *Shearman and Redfield on Negligence*, Secs. 277, 447; *Foy v. London*, *Brighton R. Co.*, 18 C. B. 225, cited in note to Sec. 277; 23 *Am. & Eng. Ency. of Law*, 128; *Collins v. Toledo R. Co.*, 80 *Mich.* 390.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The basis of this action is a personal injury which is alleged to have occurred as follows: "That plaintiff, while in the exercise of due care and caution, in attempting to board a passenger train of defendant at Edgewood, for the purpose of being carried, as a passenger, to Mason, another station, for a certain reward, by reason of the defendant's neglect to provide a safe and suitable platform, or other means of boarding trains at Edgewood, and not from any fault or neglect upon his part, slipped, and his foot gave way, and while holding with his hands to the railing and supports on the steps leading to the platform of the car, by means whereof one of plaintiff's knees was greatly sprained, bruised and injured." The evidence shows there was what is called a cinder platform, which had been constantly used at Edgewood for over ten years, which came up to about the level with the top of the iron rail of the track. The distance

from the cinders to the lower step of the car, which plaintiff boarded, was from 20 to 23 inches.

This was the usual place for passengers to board and alight from passenger trains, some eight of which stopped there daily. The plaintiff had, a number of times, got on and off the cars at the same place. He describes the occurrence as follows: "I took hold of the guard railing of the most hind part with my right hand, had my valise in my left hand, placed my right foot upon the platform; as I was getting nearly up my knee swerved and gave way and brought this knee down to the second step of the coach. With the hand I had hold of the guard, I recovered and pulled myself up."

In his letter to the company, describing the accident, soon after it occurred, he said, "When I placed my foot up and was in the act of raising my body, my knee seemed to turn, or swerve, from some cause, I can not tell what, and I felt as though my knee had been broken. I still climbed up and stood on the platform, trying to recover from the hurt."

It will be observed he did not slip, as charged in the declaration. That plaintiff was quite seriously injured is unquestionable. No complaint is made of the amount of damages allowed. The position of appellant is that no cause of action is shown by the evidence. The case is peculiar. The only negligence claimed is that the step was too high from the cinder platform. It was from 20 to 23 inches. Hundreds, and probably thousands, of passengers had yearly been boarding and alighting from the cars at the same place, under the same conditions, and so far as this record shows, no other accident occurred. There is nothing in this record to show that many other platforms are not in the same condition on this and other roads. The law does not determine how, or of what material a platform shall be constructed. The platform at Edgewood was solid and smooth. It was not elevated. The law requires that it shall be suitable and safe. The declaration avers that it was neither. The law required appellee to prove that fact, that is, "that the railway company has been guilty of doing something which a rail-

way company of ordinary care would not do or has omitted to do something which a railway company of ordinary care would do." *M. C. R. R. Co. v. Coleman*, 28 Mich. 448.

Negligence is not presumed merely because there was an accident, if what was done or omitted was in the usual course; if it was not in itself improper. *Mitchell v. C. G. T. Ry. Co.*, 51 Mich. 236.

The inquiry is not whether the accident might not have been avoided if it had been anticipated, but whether, under all the circumstances, it was negligence not to anticipate and provide against its occurrence in the exercise of ordinary prudence. *W., St. L. & P. Ry. Co. v. Locke*, 112 Ind. 404.

Ordinarily, if negligence is not apparent and an injury occurs, it belongs to that class designated as accidental. *Id.* As a general rule, where an appliance, such as a platform, is not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe and convenient, it may be continued without the imputation of negligence. *Laften v. B. & S. R. R. Co.*, 106 N. Y. 136. The case of *D. L. & W. R. R. Co. v. Napheys*, 90 Penn. St. 135, in its facts is very like this one. It is there said: "The evidence showed that the height from the top of the lower step to the rail was sixteen inches, and to the ground where Mrs. Napheys alighted not more than twenty-one inches, and probably not more than nineteen. On stepping down from the lowest step of the car platform, she advanced her left foot first to the ground, leaving her right foot upon the step, and while in that position, without any apparent cause, her right knee-cap snapped and was fractured. There was no slipping or stumbling, or any external injury by a blow or force of any kind."

In the case under consideration, the appellee said, "There was plenty of light;" "I have frequently gotten on at this place without injury;" "the step was all right," meaning the step of the car. In the *Napheys* case, the court say, "They (meaning the lady and her husband) had every opportunity of seeing and knowing where she was going and controlling her movements. If the lower step was inconven-

iently or dangerously high for her in the condition she was, she and her husband had as good an opportunity as any one else of knowing the fact. If they had any apprehension of danger or even inconvenience in descending from the lower step, there was nothing to prompt them to incur the risk. They might have called on those in charge of the train to provide a better and more convenient means of egress if they deemed it necessary." This language is applicable to the facts in this case. Doubtless, appellee, before the accident, never suspected there was any danger, although he had full knowledge of every fact that appellant had. While the court in the Napheys case reversed because the court below held the law to be that if the appellee used due care the fact of an injury resulting was *prima facie* evidence of negligence, yet it is difficult to see how there could be a recovery under the above holding as to care.

In the case of Siner v. The G. W. Ry. Co., L. Ex. Reports, Vol. 3, p. 150, and 4, p. 115, it was held, where a passenger, with knowledge of conditions, attempted to alight where there was no platform, without request of the servants of the company for relief, and was injured, there could be no recovery.

In this case, appellee's counsel assumes erroneously there was no platform, and the court in the instructions submitted it as a controverted fact. The undisputed evidence is, there was a cinder platform for passengers to use. It was not elevated, but it is common knowledge, as shown by the Napheys case, that many depot platforms, especially in large cities, are on a level with the railroad track. The question in this case was not whether there was a platform, but whether it was suitable, sufficiently elevated for the use of passengers, and should the appellant, in the exercise of that care that pertains to proper railroading, under all the circumstances of its long use, have anticipated the accident and provided against it? Care and caution relate to "foresight," and not "hindsight." The care required as to the platform was ordinary and not extraordinary. Penn. Co. v. Marion, 104 Ind. 239.

The judgment is reversed and the cause remanded.

Illinois Central Railroad Company v. Daniel Overlease.

1. **VERDICTS**—*When Not to Be Set Aside.*—Before an Appellate Court can disturb a verdict on the ground that it is not supported by the evidence, no error of law appearing in the record, it must be shown to be manifestly against the weight of the evidence.

Trespass on the Case, for killing domestic animals. Appeal from the Circuit Court of Fayette County; the Hon. JACOB FOUKE, Judge, presiding. Submitted at the August term, 1894. Affirmed. Opinion filed March 28, 1895.

FARMER, BROWN & TURNER, attorneys for appellant; V. WARNER, of counsel.

HENRY & QUINN, attorneys for appellee.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellant killed at one time a mule and at another a hog which belonged to appellee, and this suit was brought to recover the value of the two animals. A liability, under the evidence, for the hog, is conceded by appellant, but it is contended that the evidence does not justify a verdict for the value of the mule.

This is the only question presented by appellant for our consideration. The rulings of the trial court in admitting and rejecting evidence and in instructing the jury are not questioned.

It is the well-settled law of this State that, before an Appellate Court can disturb a verdict on the ground that it is not supported by the evidence, no error of law appearing in the record, the verdict must be shown to be manifestly against the weight of the evidence.

In this case the negligence of appellant, relied upon as furnishing the ground for a recovery, was the failure to ring the bell or sound the whistle, as required by law, on approaching a public highway. The evidence on this point was conflicting, and the verdict of the jury must be re-

garded as settling the question. The alleged contributory negligence of appellee's servants in attempting to cross the railroad track was also a question for the jury. They stopped the team and looked and listened for a train, but saw nothing, heard nothing, till they were too close to the track to prevent the collision. The evidence was conflicting as to whether or not the embankment at the side of the track, with the luxuriant growth of weeds upon it, concealed the train, running in the cut, from one approaching the crossing on the public highway. Some say yes, some say no. At any rate such a state of facts was shown as authorized the jury to find that appellee's servants were not guilty of negligence. In a case like this it is folly to hint at the supposed duty of this court to take a position in the jury box, and if the evidence is equally balanced on the questions of negligence, to find in favor of the defendant.

The duty of this court, under the law, is to sustain the verdict unless it is manifestly against the weight of the evidence; and a careful examination of the record has convinced us that the verdict is not manifestly against the weight of the evidence; therefore the judgment is affirmed.

Terre Haute & Indianapolis R. R. Co. v. Thomas Grandfield.

1. *NEGLIGENCE—In Repairing Crossings.*—Appellee, with his team, was upon the highway approaching a railroad crossing, where the servants of the company were engaged in making repairs. Upon inquiry, he was told by them to cross over. In doing so one of his horses stepped upon a spike in an upturned plank and was fatally injured. A recovery was sustained.

Trespass on the Case, for negligence, etc. Appeal from the Circuit Court of Fayette County; the Hon. JACOB FOUKE, Judge, presiding. Submitted at the August term, 1894. Affirmed. Opinion filed March, 23, 1895.

FARMER, BROWN & TURNER, attorneys for appellant; T. J. GOLDEN, of counsel.

HENRY & GUINN, attorneys for appellee.

Crean v. Hourigan.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee was driving a team of young horses. As he approached the railroad crossing of appellant he observed it was then being repaired, stopped his team a short distance from it and asked the men making repairs if he could cross. The foreman asked if he had a load; when informed the wagon was not loaded, the foreman told him to come on. It appears the large plank next to the rail had been taken up and turned over, which fact was observed by appellee, and the point of the nails projected upward, which appellee did not see. These loose planks extended across the crossing over which appellee had to pass, the width between the rails being about nine feet. As appellee was driving over, one of the horses shied, and stepped on the point of one of the projecting nails, which injured him so badly that he died in a few days.

The appellant claims, first, it was not negligent; second, if it was, the appellee was guilty of contributory negligence in not seeing and avoiding the spikes.

The appellant's servants by their acts produced the condition which resulted in the injury. No one would pretend the crossing was safe at that time, and yet appellee was told, in effect, that it was, without warning him of the projecting spikes. True, he saw the planks were turned over, but this fact did not give him notice the spikes were left in them. The inquiry in regard to the condition of the wagon, whether loaded or not, he naturally would infer related to the removed or displaced plank, and not to the spikes left in them which he had to pass over.

The evidence sustains the judgment, and it is affirmed.

Maurice Crean v. Michael Hourigan.

1. *WILLS—There Must Be an Intention to Make.*—If there is no intention to make a will, there can be no will. Whether an instrument is to be considered as a will or not depends upon the intention of the maker.

2. *NUNCUPATIVE WILLS—Animus Testandi.*—As to nuncupative wills

the *animus testandi* at the time of the alleged nuncupation must be shown by the clearest and most indisputable testimony, as such wills are not favored in law.

Contest of a Nuncupative Will.—Appeal from the Circuit Court of Alexander County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

GREEN & GILBERT, attorneys for appellant.

LANSDEN & LEEK, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

On the 30th day of December, 1893, the nuncupative will of Margaret Hourigan, deceased, was admitted to probate in the Probate Court of Alexander County, which bequeathed her property to her brother, Maurice Crean. The deceased's husband, Michael Hourigan, appealed from the order admitting said will to probate, to the Circuit Court, where, on trial before the court, probate was refused, from which latter order this appeal is prosecuted.

The evidence shows that on the 22d day of December, 1893, Margaret Hourigan was very sick at the hospital in the city of Cairo; that in the forenoon of that day, the reverend C. J. Eschman, the priest of that parish called on her, to whom she said, "I am a goner this time, and I don't think Michael will get to see me." When asked if he could do anything for her, she replied, "If Col. Patier could be called, he knows all about my affairs;" "she would confide with me and him what she desired to do with her property." He then left the room and called Col. Patier by telephone, and both re-entered the room together. This was shortly before noon. She said to Col. Patier, "I want all my money to go to my own dear brother, Maurice Crean." "We asked her then what she had and she told us where to find her bank book. I got the book and gave it to her and she turned it over to him. * * * She didn't mention the exact amount she had." The witness was asked if she indicated or expressed

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a desire that he and Col. Patier should bear witness to the fact that she intended to make a disposition of her property. On objection being sustained, this question was put:

Q. I will ask you again, what did Mrs. Hourigan do or say when you and Col. Patier entered the room together?

A. "When we came to the bedside she recognized us. She told us she wanted what she had to go to her own dear brother, Maurice Crean; did nothing else; simply told us this." When asked as to her purpose, the witness replied, "If I would have to state the purpose I would have to infer it from the request she made to me to send for Col. Patier." He further states that he thinks her purpose was to have two witnesses present. He further states that when she handed the bank book to Col. Patier she said, "Take that and what he had, and give it to her brother." Mrs. Hourigan died within two hours of the above mentioned interview.

On being recalled, the witness further said that she desired to have four masses offered for the repose of her soul.

Col. Patier, who was mayor of the city, testified: "I asked her what I could do for her. She told me she was very sick and that if she died she wanted me to have her buried in Chicago, by the side of her relatives; to pay all the expenses out of the funds in my hands, and the balance to give to Maurice Crean, her beloved brother, is the language I think she used. She asked me if I would do this. I told her I would. She said she wanted four masses said for the repose of her soul. I asked her if there was anything else I could do for her. She said she thought not. I asked her whether this was her wish and her will that she wanted me to carry out, and she said it was, and asked me if I would do it. I told her I would."

Q. If you know for what purpose she sent for you, please state it to the court. A. That is a hard question for me to state what I know. I can state what I supposed she sent for me for. I learned from her, as I would express myself, that she wanted to tell me what she wanted *me* to do with

the money I had in my hands; what disposition she wanted to make of it. This was after the book had been passed to me. I had one book in my hands already for about \$400 or \$500. It would be altogether \$800 or \$900. The money I held was deposited in my name for her. The other was deposited in her name.

The real question in the case is, does the evidence show that Margaret Hourigan *intended* to dispose of her property by *will*, and evince such intent at the time by desiring the "persons present, or some of them, to bear witness that such was her *will*, or words to that effect." Chap. 148, Sec. 15 of Statutes; or does it show that she merely intended to authorize and direct Col. Patier to dispose of her property in the manner she requested? The section referred to provides: "A nuncupative will shall be good * * * if committed to writing within twenty days after the making thereof and proven * * * by two or more credible, disinterested witnesses, who were present at the speaking and publishing thereof, * * * that they were present, and heard the testator pronounce the said words." And that she did desire the persons present, or some of them, to bear witness, etc., as above quoted.

This language makes it clear that there must be an intention to make a will as such. "If there is no *animus testandi* there can be no will." Bouvier. "Whether an instrument is to be considered as a will or not depends upon the intention of the maker." Jarman on Wills. As to nuncupative wills, it is said: "The *animus testandi*, at the time of the alleged nuncupation, must be shown by the clearest and most indisputable testimony." Note and citations to Sec. 2, Chap. 6, Vol. 1, p. 238, Jarman on Wills.

It is further said: "Nuncupative wills are not favorites of the law. It is desirable, therefore, that the *factum* of such a will should be strictly proved." This rule is rigidly adhered to in this State. Arnett et al. v. Arnett, 27 Ill. 247; Morgan v. Stevens, 78 Ill. 287.

The evidence carefully analyzed as to what Mrs. Hourigan said in regard to the disposition of her property, con-

Delta Electric Co. v. Whitcamp.

sidered in connection with what she did not say, does not, in our judgment, within the rules of law above announced, establish a nuncupative will, but rather forces the conclusion that she merely intended a gift *causa mortis* to her brother, Maurice Crean.

The judgment is affirmed.

Delta Electric Company v. William Whitcamp.

58	141
72	431

1. BRIEFS—*Failure to File*.—The Appellate Court has power to reverse a cause for a failure on the part of the appellee to file briefs as required by the rules of the court.

2. RAILROAD COMPANIES—*Liability for Injuries to Animals Trespassing*.—A railroad company is not liable for injuries to animals trespassing upon its track, unless the act from which the injury resulted was willful or wanton, or, after the animal was discovered on the track, the servants of the company were negligent.

Trespass on the Case, for injuries to domestic animals. Appeal from the Circuit Court of Alexander County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the August term, 1894. Reversed. Opinion filed March 28, 1895.

LANDSEN & LEEK, attorneys for appellant.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee has filed no brief and therefore this cause might be reversed under rule 31 of this court. We have examined the record and find the facts to be, the mule of appellee, which was injured in the collision, was trespassing on appellant's track. Under this state of facts, the law is the defendant was not liable for the injury unless, first, the act was willful or wanton, or second, that after the animal was discovered to be on the track, the servants of the defendant were negligent. *T. P. & W. Ry. Co. v. Barlow*, 71 Ill. 640; *I. C. R. Co. v. Noble*, 142 Ill. 578; *I. C. R. Co. v. Beard*, 49 Ill. App. 232. The evidence does not justify a finding against appellant under this view of the law. The judgment is therefore reversed.

58	142
158s	821
58	142
68	600
58	142
194s	10148

**Chicago & Alton Railroad Company v. Hattie Logue,
Administratrix of Walter Logue, Deceased.**

1. **PARTIES—Death from Negligent Act.**—In an action by the next of kin against a railroad company for negligently killing a human being, a brother or sister of the deceased, born shortly after such killing, is an heir and a necessary party to the suit.

2. **AMENDMENTS—Of Pleading—Discretion of the Court.**—To allow an amendment of the declaration without terms, by making an additional party plaintiff in an action for damages resulting from a death caused by negligence, after a judgment has been reversed by the Appellate Court and the cause has been remanded for want of such party, is not an abuse of judicial discretion.

3. **SAME—Without Terms—When Proper.**—In the trial of an action for negligence resulting in the death of a child, it is proper to permit, without imposing terms, the declaration to be amended, so as to show that the child, when killed, was sitting instead of standing on the track, and was upon, rather than crossing, the track.

4. **SAME—Request for Imposition of Terms.**—When the record does not show that the defendant asked the court to impose terms upon the plaintiff for leave to amend the declaration, or that he did not allege the failure of the court to impose terms as one of the grounds for a new trial, the question can not be raised in the Appellate Court.

5. **SAME—Imposition of Terms—Exceptions.**—If it is proper that terms be imposed upon a party for leave to amend, the adverse party should ask that it be done, and may preserve an exception to the action of the court in refusing to do so.

6. **PARTIES AS WITNESSES—Change of Pending Suit to Render Them Competent.**—In an action to recover damages for the killing of a child, the father resigned as administrator and the mother was appointed as such during the trial, and was, thereupon, substituted as plaintiff in the place of the father. As there was nothing to show that the appointment of the mother was irregular, it was held to be no objection that such change was made to render both father and mother competent witnesses in the case.

7. **TRIALS—Improper Remarks of the Court.**—If a party aggrieved by remarks of the judge during the trial, does not except at the time, he can not assign the same for error in the Appellate Court.

8. **EVIDENCE—Rules of Defendant Corporations.**—In an action against a corporation for negligence resulting in death, the rules of the defendant may be competent, as tending, with other evidence in the case, to show negligence.

9. **SAME—Objections to—General and Special.**—If a party desires to object to the manner in which evidence is presented to the jury, the objection must be specific. A general objection is not sufficient.

10. **NEGLIGENCE—A Finding of, Sustained—Statement of Facts.**—Where an engineer sees an object on the track and can not determine absolutely whether it is a child or some inanimate thing, and sees a woman's frantic demonstrations as she runs toward the object with a manifest desire to stop the train, and knows that if he waits to ascertain certainly what the object is it will be too late for him to save the child, if it be a child, and he waits until he knows what the object is before reversing his engine and applying the brakes, a jury will be warranted in finding such a course to be an undervaluation and a reckless disregard of life.

11. **SAME—Parents' Care for Children.**—The wife of a station house keeper, who, with his family, lived in the station house, left a child twenty-one months old sitting in one of the rooms, absenting herself for a few minutes to attend to the wants of another child lying sick in an adjoining room. In her absence the child went upon the track where it was killed by a passing train. *Held*, that the parents of the child were not guilty of such negligence as to bar a recovery.

12. **SPECIAL FINDINGS—When in Aid of the General Verdict.**—Where the jury answered certain special interrogatories submitted to them at the request of the defendant, to the effect that the engineer did not endeavor to ascertain what an object on the track was as soon as he could and that after ascertaining what it was he stopped his train as soon as he could, *it was held* that the finding aided the general verdict by showing that the jury found for the plaintiff on the ground, that under the circumstances it was negligence to wait until he knew absolutely that the object was a child before endeavoring to stop the train.

13. **DAMAGES—When Not Excessive.**—A verdict for \$1,500 for negligently running over and killing a child twenty-one months old is not excessive.

Trespass on the Case for damages. Death from negligent act. In the Circuit Court of Madison County; the Hon. GEORGE W. WALL, Judge, presiding; declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Submitted at the August term, 1894, and affirmed. Opinion filed March 23, 1895.

APPELLANT'S BRIEF, WISE & McNULTY, ATTORNEYS.

In this class of cases the negligence of the parents is imputed to the child. Their negligence in permitting the child to get beyond their control and go upon the railroad track where it was killed is such as prevents a recovery in this suit. Thompson on Neg. 1191; Beach on Contributory Neg., Sec. 44; City of Chicago v. Major, Admr., 18 Ill. 349; City of Chicago v. Starr, Admr., 42 Ill. 174; Chicago & A. R. R. Co. v. Becker, 84 Ill. 483; Toledo W. & W. Ry. Co. v.

Miller, Admr., 76 Ill. 278; Toledo W. & W. Ry. Co. v. Grable, Admr., 88 Ill. 441; Chicago City Ry. Co. v. Wilcox, 138 Ill. 379.

APPELLEE'S BRIEF, TRAVOVS & WARNOCK, ATTORNEYS.

The imposition of terms on allowing amendments rests within the sound discretion of the court; and its refusal to impose terms, such as payments of costs, can not be assigned as error, especially where the amendments relate to formal matters. *Heslep v. Peters*, 3 Scam. 45; *Schofield v. Settley*, 31 Ill. 515; *Schirmeier v. Baecker*, 20 Ill. App. 373; *Tomlinson v. Earnshaw*, 112 Ill. 311.

The objection to the reading of rule 47 from a book for the reason that the book itself is the best evidence can not avail the defendant in this court, as the objection made below was general. The rule was proper evidence. *Howell et al., Executors, v. Edmonds*, 47 Ill. 79; *Clevenger v. Dunaway*, 84 Ill. 367; *Mackin v. O'Brien*, 33 Ill. App. 474; *L. S. & M. S. Ry. Co. v. Ward*, 135 Ill. 518.

The circumstances of this case show no negligence on the part of the child's parents. *C. & A. R. R. Co. v. Gregory*, 58 Ill. 226; *City of Chicago v. Hessing, Admr.*, 83 Ill. 204; *Gavin v. City of Chicago*, 97 Ill. 66; *Stafford et al. v. Rubens*, 115 Ill. 196; *E., J. & E. Ry. Co. v. Raymond*, 148 Ill. 241.

Whether the parents were guilty of contributory negligence was a question of fact, to be determined by the jury from the evidence and circumstances of the case. *City of Chicago v. Major*, 18 Ill. 361; *C. & A. R. R. Co. v. Adler*, 129 Ill. 335; *C. & A. R. R. Co. v. Lane*, 130 Ill. 116; *L. S. & M. S. Ry. Co. v. Parker*, 131 Ill. 557.

The death of the child was caused proximately by the omission of appellant's servants to use ordinary care to avoid the danger, after they became aware, or by the exercise of reasonable care might have become aware of it. It is immaterial whether the parents were negligent in permitting the child to be upon the track or not. *Chicago West. Division Ry. Co. v. Ryan*, 131 Ill. 477; *Werner v. Railway*

Co., 81 Mo. 374; Meeks v. Southern Pacific R. R. Co., 56 Cal. 513; Pullman Palace Car Co. v. Laack, 143 Ill. 242.

It can not be said the damages are excessive. The compensation to be awarded not being capable of exact measurement, it is for the jury to determine the proper amount in view of all the circumstances. C. & A. R. R. Co. v. Becker, 84 Ill. 483; City of Chicago v. Keef, 114 Ill. 222.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

About six weeks after Walter Logue had been killed by appellant's train, Walter's mother gave birth to a son, named Willie. This child was not mentioned in the declaration as one of Walter's heirs, and for the variance in this respect between the evidence and the declaration, and for other errors mentioned in the opinion, the first judgment in favor of appellee was reversed by this court. 47 Ill. App. 292.

When the cause had been re-docketed in the Circuit Court, appellee, by leave of court granted without terms, amended the declaration so as to show the fact of Willie's birth. It is insisted that the court should have allowed the amendment only upon terms. We think that the court did not abuse its discretion in permitting the amendment to be made without terms.

It was also eminently proper for the court to permit the declaration to be amended on the trial, without terms, so as to show that the child, when killed, was *sitting* and not *standing* on the track, and was *upon* rather than *crossing* the track. These amendments could not in any manner have affected the defense of the case on the merits.

It is insisted, however, that the substitution of the boy's mother as plaintiff in place of the boy's father should not have been permitted without imposing terms. But it appears from the record, that when leave to make this amendment was obtained, appellant did not ask that terms should be imposed. Neither was anything said, specifically, about the allowance of this amendment without terms in any of

the thirteen reasons set forth in the written motion for a new trial. And so the question is raised for the first time by the assignment of errors in this court. The objection comes too late. It was proper for the court to permit the amendment to be made, and if terms should have been imposed appellant should have asked that this be done, or should have preserved an exception to the action of the court in some other sufficient manner. *Tomlinson et al. v. Earnshaw et al.*, 112 Ill. 311.

But it is said that the father resigned as administrator, and the mother was appointed as such during the trial; that thereupon the substitution of the mother as plaintiff in place of the father was made; that this was done in order that both father and mother might be competent witnesses in the case; and that for this reason the amendment should not have been allowed.

There is nothing in the record to show that the appointment of the mother as administratrix was irregular or void. Appellant's counsel asked for time to inspect the records and files of the County Court relative to the appointment of the mother as administratrix, but the court advised them to go on with the trial, "to which remark of the court counsel for defendant made no response." If counsel desired to allege this as error, they should have made a response in the way of an exception.

It is also alleged that the court erred in admitting in evidence the 47th of appellant's rules, which is as follows:

"Engineers must be particular to sound the whistle at all whistling posts and railroad crossings, and strictly regard slow boards. The engine bell must be rung at all highway crossings, commencing at least eighty rods from the crossing, and the bell kept ringing until the engine shall have passed the highway. At obscure crossings two long and a succession of short blasts of the whistle must be sounded until after the engine shall have reached the road. All fines imposed upon the company in consequence of a disregard of this rule will be collected from the engineer in fault."

That this rule was competent evidence seems unquestionable under the authority of *L. S. & M. S. Ry. Co. v. Ward*,

135 Ill. 511, in which case it was said: "The rule was admitted in evidence, not for the purpose of founding a substantive cause of action upon its breach, but as tending, with the other evidence in the case, to show negligence in driving and managing said engine." The first count of the declaration in the case at bar avers negligence in managing the engine and train, while the second count avers the failure to ring the bell or sound the whistle. As bearing upon the question of negligence in the management of the engine, the evidence was properly admitted.

But it is said that the court erred in permitting the witness to read the rule to the jury; in other words, that if the rule was competent at all, the printed rule itself, as being the best evidence, should have been introduced in evidence. No specific objection was made on the ground that the reading of the rule was not the best evidence. A general objection is not sufficient to enable appellant to raise this point in this court.

More important questions than these, however, remain for consideration. Was the negligence of the parents such as to preclude a recovery by reason of imputed negligence? Were the servants of appellant guilty of negligence in the management of the train? Did the court err in giving and refusing instructions? Are the damages excessive? A brief statement of the evidence is necessary in order to the proper answering of these questions.

Walter's father, Alexander Logue, had been station agent at Edwardsville crossing for about three years, during which time he had resided with his family in the depot building. Appellant's road ran north and south on the west side of the depot, while the road popularly called the Big Four, ran on the east side thereof, the two tracks being perhaps fifty feet apart. The depot building contained four rooms. The north room was used for the office of the roads; the room south of it as a sitting room for Mr. Logue's family; the third room, which was south of and two steps lower than the sitting room, as a bed room; and the fourth room, which was two steps lower than the bed room, as a kitchen. Passing from the kitchen through a door on the west, one came to

a small yard, from which he might reach the platform by ascending three steps, the platform being about four feet higher than the yard. There was a door between the office and the sitting room, which was generally kept closed and which could not be opened by the boy, Walter, who was only twenty-one months old.

Alexander Logue generally remained on duty from seven in the morning till seven in the evening, when he was relieved by the night operator. Having a death message to deliver, he got the night operator to take his place earlier than usual and went to the stable, which was west of appellant's track, to hitch up his horse, leaving Walter in the kitchen with his mother. Another boy, Russell, was very sick with scarlet fever, and the mother went to the bed in the bed-room, where the child was lying, to render him some attention. She gave the sick boy a drink of water and turned his pillow. She was in the bed-room from one and a half to two minutes. She had left Walter sitting on the lower of the steps which led from the kitchen to the bed-room. Returning to the kitchen she found Walter gone and hurried into the yard and thence upon the platform in search of him. She saw the child sitting on the track with his back to the north, about seventy-five or one hundred feet north of her and the train coming from the north at the rate of forty-five or fifty miles an hour. The train did not stop at this station unless signaled to do so. The signal was generally given by the dropping of a green ball and the ball had not been lowered. The track was level for two miles north of the station and there was nothing to obstruct the view. There was a conflict of the evidence as to the position of the child with reference to the public highway, which crossed the track just north of the platform, and also as to whether or not the bell was rung or whistle sounded, in conformity with the requirements of the law. The jury might well have answered both of these questions in favor of appellee.

The mother called her husband and ran toward her child, screaming and waving her hands, and then sprang across

the track in front of the engine, seizing the child by the dress and thinking she had saved it. She had failed, however. The child was killed and she was knocked down and injured.

The engineer saw the mother's demonstrations and saw the object on the track, but did not seek to get his train under control till he saw the object move and was thereby satisfied that it was alive. He practically admits, and the jury were justified in finding, that if he had reversed the engine and applied the emergency brake when he first saw the object and the mother's demonstrations, the mother could have saved the child. The position taken by the engineer, and others called as experts, is set forth in the proposition that if an engineer sees an object on the track and can not determine absolutely whether it is a child or some inanimate thing, and sees a woman's frantic demonstrations as she runs toward the object with a manifest desire to stop the train, and knows that if he waits to ascertain certainly what the object is it will be too late for him to save the child, if it be a child, then it is the right or duty of the engineer to wait until he knows what the object is, before reversing the engine and applying the brakes. Under the facts disclosed by the record in this case, a jury would be warranted in finding such a course to be an undervaluation and a reckless disregard of life, even though many experts should express an opinion to the contrary.

On the question of the negligence of the parents, we are of the opinion that no such negligence is shown as to bar a recovery. On the question of appellant's negligence, we are of the opinion that such a degree of negligence is shown as to authorize a recovery.

The first and second of appellant's refused instructions state in substance, that if the engineer could not distinguish the object to be a child until so near that the child was killed before the train could be stopped, then there could be no recovery. This proposition is contrary to our views of the law as hereinbefore announced. The third of appellant's refused instructions told the jury that the negligence of the

child's parents was such as to preclude a recovery. This instruction invaded the province of the jury and was therefore properly refused. It is admitted that the fourth refused instruction was not proper after the declaration had been amended.

We find no error in the modification of appellant's instructions or in the giving of appellee's instructions.

The jury answered certain special interrogatories submitted to them at the request of appellant, to the effect that the engineer did not endeavor to ascertain what the object on the track was as soon as he could; that after ascertaining that the object was a child, he stopped the train as soon as he could, but after first seeing the object he did not endeavor to get his train under control, and that, while the engineer could not have stopped the train in time to save the child's life after discovering that the object was a child, yet if he had endeavored to control his train as soon as he saw the object, the mother could have saved the child.

It does not follow that, because of these special findings, the court should have disregarded the verdict and rendered judgment for appellant, or that the verdict should have been set aside because of its inconsistency with the special findings. These findings aid the verdict by showing that the jury found for appellee on the ground that, under the circumstances of this case, it was negligence for the engineer to wait until he absolutely knew the object to be a child, before seeking to get his train under control.

It is said that the verdict of \$1,500 in this case is excessive. It is not claimed that the court erred in stating to the jury the measure of damages; but it is said that the sum of \$1,500 is too much for the killing of a child of this age under any circumstances. Appellant cites two cases, in each of which the amount recovered for killing an infant was \$800, and the verdict was not disturbed (*City of Chicago v. Major*, 18 Ill. 349; *City of Chicago v. Hesing*, 83 Ill. 204); also another case in which the recovery of \$1,000, for killing a child twelve years of age, was sustained (*City of Chicago v. Powers*, 42 Ill. 169); also another case, in which a

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judgment of \$1,000 for killing a child nine years of age was not considered excessive (I. C. R. R. Co. v. Slater, 129 Ill. 91); also another case in which the recovery of \$2,000, for killing a child seven years of age, was sustained (C. & A. R. R. Co. v. Becker, 84 Ill. 483). But these authorities, instead of showing that the verdict in the case at bar is excessive, are excellent authorities in support of the contrary proposition.

No substantial error appears in this record, and the judgment is therefore affirmed.

**Thomas Cauley v. East St. Louis Electric Street
Railroad Company.**

1. **ORDINARY CARE—Exercise of, by Minors.**—The rule of law that before a person can recover for injuries sustained he must show that he was in the exercise of due care and caution, applies to infants as well as to adults.

2. **NEGLIGENCE—Children Playing in Streets.**—When the parent negligently permits his child to play in the street and upon railroad tracks, if he is injured, no recovery can be had.

3. **TRIALS—Misconduct of Jurors—Examination of the Charge.**—When the charge of misconduct on the part of the trial jurors is made a ground for a new trial and is presented to the court upon conflicting affidavits, the finding of the facts by the court is conclusive.

Trespass on the Case for personal injuries. In the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment for defendant; error by defendant. Heard in this court at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

**BRIEF FOR PLAINTIFF IN ERROR, JESSE M. FREELS AND A. R.
TAYLOR, ATTORNEYS.**

It is not negligence *per se* to permit a child three and a half years old to go upon the street accompanied by a brother four years older. *Stafford v. Rubens*, 115 Ill. 196; *Gavin v. Chicago*, 97 Ill. 66; *Pittsburg v. Fort Wayne, etc., Ry. v. Bumstead*, 48 Ill. 221.

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The question whether a child of the age of four or five years can be guilty of contributory negligence is not entirely settled in this State, but the weight of authority is that a child of such age can not. *Chicago Railway v. Wilcox*, 138 Ill. 382; *Chicago v. Hesing*, 83 Ill. 204; *Gavin v. Chicago*, 97 Ill. 66; *Railway v. Ryan*, 131 Ill. 474; *Railway v. Welsh*, 118 Ill. 572.

As to the question that a child is not held to the degree of care expected of a mature adult, there is no dispute in the authorities in this State. *Railway v. Becker*, 76 Ill. 25; *Railway v. Murray*, 62 Ill. 386; *Kerr v. Forque*, 54 Ill. 482; *Railway v. Eminger*, 114 Ill. 79; *Railway v. Wilcox*, 138 Ill. 383.

CHARLES W. THOMAS, attorney for defendant in error.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

This suit was brought by plaintiff in error to recover damages sustained by reason of injuries received by his child, Patrick, who was run over by one of defendant in error's cars on February 13, 1892. At the time of the accident Patrick was a healthy boy, between four and five years of age.

Appellant was a night watchman, with no means of support but his daily earnings. His family consisted of himself, his wife and nine children, the oldest child being between twelve and thirteen years of age.

In front of Thomas Cauley's residence was one of defendant in error's tracks. Patrick was upon the street, under charge of his sister older than he. Many children were playing upon the street, and Patrick attempted to cross the track to join some children who were upon the other side. One of defendant in error's cars, impelled by electricity, was approaching, and the sister strove with all her power to detain her brother and prevent him from crossing the track. She strove in vain, however. The boy broke loose from her grasp, dashed upon the track, and was seriously

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injured. He lost one leg and a toe from the other foot. The jury returned a verdict in favor of defendant in error, and found in answer to special interrogatories, propounded at the latter's request, that Patrick was not exercising due care and caution to avoid injury when he was hurt, and that the injured boy's parents negligently permitted him to play upon the streets. These were questions of fact, properly submitted to the jury for their determination. The evidence abundantly justifies the special findings, and therefore justifies also the general verdict in favor of defendant in error.

It is alleged that the court erred in the charge to the jury. We have carefully examined the instructions, and have come to the conclusion that, when the instructions are considered as a series, they fairly presented the law to the jury, so as to enable them to properly understand the case. While there are some imperfections in the instructions, we do not regard the imperfections as being of such a serious nature as to require the reversal of the judgment.

Another question has been raised on the argument which concerns the alleged corruption of two of the jurors. In support of a motion for a new trial, affidavits were filed on behalf of plaintiff in error whereby it was sought to show that these two jurors, who were colored men, had been corruptly approached by another colored man, and indirectly by a certain white man, who were alleged to be acting for defendant in error, during the trial. Affidavits were filed upon the other side tending to exculpate the accused persons from any intentional wrong. We think that the affidavits show the innocence of defendant in error's counsel.

As to the other persons concerned, we desire to refrain from any unnecessary comment. Suffice it to say, that all persons engaged in the trial of a case before a jury should be exceedingly careful with reference to their intercourse with the members of the jury. Ground for suspicion may be given by unnecessary association on the part of counsel or litigant with one of the jurors, when no wrong was intended, and no improper influence was, in fact, exerted. The con-

fidence of the people in courts of justice and especially in jury trials, can only be sustained when these proceedings are conducted with such circumspection as to furnish no ground for a suspicion that court or jury has been influenced by any improper motive.

But the question whether or not an effort was made to influence the jury in favor of defendant in error was a question of fact, presented by conflicting affidavits, considered by the trial court on the motion for a new trial, and therefore a question settled by the judgment of that court, unless we can say that the court below erred in weighing and passing upon these affidavits. We are not prepared to do this. On the contrary, we are satisfied with the action of the lower court on this branch of the case.

We have found no prejudicial error in the record and the judgment is therefore affirmed.

Hugh Grogan v. Big Muddy Coal & Coke Company.

1. *NEGLIGENCE—Ordinary Care.*—The plaintiff was loading coal at a mine. His team was not tied nor unhitched from the wagon. The whistle on the engine sounded as a usual and customary signal to the engineer. The team became frightened and tried to run away. In trying to stop them he was thrown down and injured. He was defeated in an action to recover damages, there being no proof that the alleged negligence in sounding the whistle was a willful or wanton act.

2. *SAME—A Relative Term.*—Negligence is a relative term. What is negligence under certain circumstances may not be under different circumstances.

3. *SAME—Rule as to Comparative.*—The rule of comparative negligence only applies when the person alleging negligence is himself using due care at the time.

4. *SAME—Slight, and Due Care.*—Slight negligence is not incompatible with the exercise of due care; the comparison can only be submitted as between the parties, coupled with the condition that the plaintiff is in the exercise of due care on his part.

Trepass on the Case, for personal injuries. In the Circuit Court of Jackson County; the Hon. ALONZO K. VICKERS, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment

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for defendant; error by plaintiff. Heard in this court at the August term, 1894, and affirmed. Opinion filed March 28, 1895.

W. A. SCHWARTZ, attorney for plaintiff in error.

GEO. W. HILL and JAS. H. MARTIN, attorneys for defendant in error.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee operated a coal mine at the time of the accident hereafter described. It shipped coal by the car load and sold to others in the vicinity, who took the same away in wagons. The coal was stored near the engine, about fifty feet distant. The appellant, by direction of his employer, was hauling coal in the forenoon, while the machinery was in operation. The team apparently was indifferent to the noise made. In the afternoon, coal was not being hoisted, but steam was kept up for pumping and to hoist men out of the shaft. The appellant drove his team up to the coal chute or bin in the afternoon and loaded his wagon, as he had done before. There was a signal from some men at the bottom of the shaft to be hoisted. The engineer was not at his post. The fireman observed the signal and waited for the second one before going to the engine to sound the call, or whistle, for the engineer. When he sounded the whistle, the horses became frightened and started off. The appellant attempted to stop them, got between the wheels, was knocked down and so injured in one of his legs that it had to be amputated. The fireman who sounded the whistle knew appellant's team was at the chute, and that he was loading the wagon with coal. It appears the appellant did not fasten the team, unhitch them, or drop any of the tugs. The team were reasonably gentle, though there is some evidence one of them was a little skittish.

The jury found for the appellee, which was sustained by the court. The errors discussed relate to the evidence and the instructions. The court submitted the question to the jury as to whether the act of the fireman was, in view of the conditions, negligent. On this question, the evidence

sustains the finding. There is no claim the act of alleged negligence was a willful or wanton act. It was the customary and usual signal to call the engineer when absent. There can be no pretense, therefore, the act itself was negligent or was done in an unlawful manner. The only claim that can be made is that the whistle should not have been sounded at all while appellant's team was properly on the premises. This view can not be sustained.

The appellee had a right to use its machinery in the usual and customary way. It was so used in this case. It is true negligence is a relative term. What might not be negligence under certain circumstances, might be under different circumstances. Had the fireman known the team was easily frightened, or was restless at the time, and that they were not fastened, then it might be, without the duty was very urgent to sound the whistle, that he should have forbore for the time, or have notified appellant to be on his guard. There is nothing, however, in the facts of this case that would indicate the team were easily frightened. They had been there in the forenoon when all the machinery was in operation, and gave no indication of being frightened. It is evident the appellant thought they were trustworthy, for he did not take any precautions to secure himself against such a contingency. If he, knowing the team, trusted them, why should not the fireman? He certainly knew the whistle was liable to be sounded. The steam was up and he could have seen it had he looked. It is evident he had no fear of any difficulty from the sounding of the whistle until it occurred.

The criticism on appellee's third instruction, it is thought, is hypercritical. It does not state that the jury should find for the defendant unless the fireman sounded the whistle for the purpose of frightening the horses.

The context, considered in connection with all of the instructions, shows the question of negligence was submitted fairly to the jury. The words, "so as to frighten the horses," mean, in their connection, the same as "and thereby frightened the horses." The sixth instruction is subject to

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criticism, especially in the first clause. That was evidently intended to state a legal proposition, viz., that the rule of comparative negligence only applies where the person alleging negligence is himself at the time in the exercise of due care. Considered in connection with the preceding instruction, of which it properly formed a part, it would not mislead the jury. The instruction of appellant in regard to comparative negligence was properly refused because it did not contain the element just referred to, of due care on the part of the plaintiff. It has been repeatedly held that slight negligence is not incompatible with the exercise of due care. The comparison can only be submitted as between the parties, coupled with the condition that the plaintiff is in the exercise of due care on his part.

There being no substantial error in the record, the judgment is affirmed.

Edgar A. Medley v. Specker Brothers & Co.

1. **PAYMENT**—*When the Taking of a Note is.*—The taking of a note, either of the debtor or of a third person, for a pre-existing debt, is no payment of the debt, unless it is expressly agreed that the note shall be taken as such payment, or unless the creditor parts with the note, or is guilty of *laches* in not presenting it for payment in due time.

2. **PROMISSORY NOTES**—*For Pre-existing Debts.*—The taking of a promissory note for a pre-existing debt in the absence of an agreement to the contrary, is considered as a conditional payment or collateral security.

3. **INSTRUCTIONS**—*Repetitions.*—It is not error to refuse to give an instruction where the preceding instructions given for the same party embody all that is material in the one refused.

Assumpsit, for goods sold and delivered. In the Circuit Court of Clay County; the Hon. SILAS Z. LANDES, Judge, presiding. Declaration, common counts; the pleas are stated in the opinion of the court; trial by jury; verdict and judgment for plaintiff; appeal by defendant; submitted at the August term, 1894, of this court. Affirmed. Opinion filed March 23, 1895.

HOFF & HOFF and HAGLE & SHRINER, attorneys for appellant.

B. D. MONROE, attorney for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This is a suit in assumpsit brought by appellee to recover the purchase price of a bill of merchandise averred to have been sold to defendants, Edgar A. Medley and Adam Ewing, as partners, under the firm name of E. A. Medley & Co. Defendants pleaded the general issue, and Medley pleaded a separate special plea, setting up that he was not a partner with Ewing on February 20, 1893, in respect of the cause of action in the declaration mentioned, except as to the sum of \$63.22, part thereof. On the issues thus tendered the cause was tried, and a verdict for appellee was returned for \$421.56 damages. Defendants' motion for a new trial and in arrest of judgment were overruled, and judgment for the sum found by the verdict and for costs was entered. Medley took this appeal, and contends that the credit was extended to the firm which succeeded E. A. Medley & Co. in the business, and not to defendants below, for the merchandise sold, and also that a note given by one Blanck to the traveling salesman of appellee on April 21, 1893, was given and accepted by appellee in settlement of the pre-existing indebtedness of E. A. Medley & Co., for said merchandise. The evidence justified the finding that said firm bought the goods from appellee, and were liable for the sum found due by the verdict. The jury was also warranted in finding the note of Blanck delivered to the salesman was not accepted by him, nor by appellee as payment or settlement of the debt sued for. It is a rule well settled and repeatedly recognized, that the taking of a note, either of the debtor, or of a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to take the note as payment and run the risk of its non-payment, or unless the creditor parts with it, or is guilty of *laches* in not presenting it for payment in due time. It is considered as a conditional payment, or collateral security. Cheltenham Stone & Gravel Co. v. Gates Iron Works, 23 Ill. App. Rep. 635; same v. same, 124 Ill. 623. The instructions for plaintiff which are complained of, announced

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the law to be as held in the cases above cited, and it was not error to so instruct the jury. The refusal to give the instructions four and five on behalf of defendants, as requested, was not error. The preceding instructions given for them embodied all that was material in refused instruction four, and refused instruction five did not state the law correctly. No good reason is given for reversal, and the judgment is affirmed.

**Samuel B. Callaway, Receiver of the Toledo, St. L. and
K. C. R. R. Co. v. John T. Sturgeon.**

1. NEGLIGENCE—*Setting Fires—Proof*.—In actions against railroad companies for damages caused by fire, proof that the fire was communicated by a passing locomotive on the defendant's road is under par. 104, page 1949, S. & C. Statutes, to be taken as full *prima facie* evidence, to charge the company with negligence.

2. RAILROAD COMPANIES—*Negligence in Setting Fires—Questions for the Jury*.—In an action for damages done by fire, the question as to whether the *prima facie* proof under the statute has been overcome by the defendant's evidence is one of fact for the jury.

Trespass on the Case, for damages by fire. In the Circuit Court of Fayette County; the Hon. JACOB FAUKE, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; error by defendant. Heard in this court at the August term, 1894. Affirmed. Opinion filed March 28, 1895.

**BRIEF FOR PLAINTIFF IN ERROR, BAYLESS & GUENTHER,
ATTORNEYS; CLARENCE BROWN, OF COUNSEL.**

There must be some negligence upon the part of the railroad company before a liability can arise. It is fundamental law that a railway company, when properly organized and empowered by the laws of the State, has full authority and right to use its right of way for its legitimate chartered purposes, to the exclusion of all the world; and it has an absolute right to work its engines in the usual and proper way, and when necessary, in the exercise of this right, to

send forth particles of fire from them, and it is not liable for injuries caused thereby to private property, unless it fails to exercise its right in a lawful manner and with reasonable care and skill. *Pierce on R. R.* 431; 1 *Thompson on Negligence*, 162; *Williams v. N. A., etc., R. R. Co.*, 5 *Ind.* 111; *P., C. & St. L. R. R. Co. v. Jones*, 86 *Ind.* 496.

Where the evidence does not sustain the verdict it is the duty of the court to set the verdict aside and grant a new trial. *C. & A. Ry. Co. v. Stumps*, 71 *Ill.* 567; *Brown v. Klagle*, 2 *Brad.* 414; *Clark v. People*, 111 *Ill.* 404.

BRIEF FOR DEFENDANT IN ERROR, HENRY & GUINN,
ATTORNEYS.

Where a *prima facie* case is made by showing that fire escaped from a passing engine and set fire outside the right of way, the burden of proof is changed to the defendant. The finding of the jury upon that issue will not be disturbed unless the verdict is wholly unwarranted by the evidence in the case. *St. Louis, A. & T. R. v. Storts*, 47 *Ill. App.* 342; *L. & E. R. R. Co. v. Spencer*, 47 *Ill. App.* 503; *Chicago & E. R. R. Co. v. Gayette*, 133 *Ill.* 21; *Wabash R. R. Co. v. Francis*, 42 *Ill. App.* 527; *Toledo, St. L. & K. C. R. R. Co. v. Anderson*, 48 *Ill. App.* 130; *Same v. Kingman*, 49 *Ill. App.* 43.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover damages for the destruction of fence rails and damage to meadow of plaintiff by fire, averred to have been caused by sparks and brands of fire thrown from defendant's locomotive engine. The jury found defendant guilty of the negligence charged, and assessed plaintiff's damages at \$82. For this sum and costs of suit judgment for plaintiff was entered, to reverse which the defendant sued out this writ of error. Twelve errors are assigned, and one only seems to be relied on, viz.: That the verdict was against the evidence and the court erred in refusing to set it aside.

It was proven that the fire was communicated by the defendant's locomotive engine while passing along its rail-

road, and by the provision of Par. 104, p. 1949, Starr & Curtis Rev. Statute, 2d Vol., this proof must be taken as full *prima facie* evidence to charge the defendant with the negligence complained of. The *prima facie* case for plaintiff thus established was sought to be overcome by the evidence of servants of the defendant, to the effect that the engine was equipped with a spark-arrester of the most approved style, in good repair, and was operated by a skilled and competent engineer and fireman.

But it also appears in evidence when the fire was communicated, the engine was pulling a light train at ordinary speed, on a down grade, and the engineer testified on cross-examination that if the spark-arrester was in good condition under the conditions in which he was then running his train, he did not believe the engine could throw fire and ignite grass 110 feet away, and further testified that he did not believe that sparks could escape through a properly constructed arrester under the conditions in which he was then running and set fire to grass 110 feet off. And it does appear by the proof, the fire was communicated to the grass of plaintiff at that distance from the passing engine. A conflict of evidence thus existed touching the character and condition of the spark-arrester, a vital question in the case, which the jury determined in favor of appellee, and no good reason appears for disturbing the verdict. St. L., A. & T. R. Co. v. Stratz, 47 Ill. App. 342; L. E. & St. L. Con. R. Co. v. Spencer, Ibid. 503; C. & E. I. R. R. Co. v. Gazette, 133 Ill. 21; T., St. L. & K. C. R. R. Co. v. Kingman, 49 Ill. App. 43; and L. E. & W. v. Black, decided by this court June 23, 1894, sustain our view above expressed. Judgment affirmed.

Thomas D. Forehand v. Niagara Insurance Co.

1. **INSURANCE—Pleading a Forfeiture.**—In an action upon a policy of insurance, the introduction of the policy with proof of loss makes out a *prima facie* case for the plaintiff. The defendant in pleading a cause of forfeiture must allege every fact necessary to show a forfeiture.

2. *SAME—Defenses to Actions on Policies.*—In an action upon an insurance policy, a plea of a failure to comply with a provision of the policy expressly warranting that "the insured shall take an inventory of the stock covered by the policy at least once a year, and keep books of account correctly detailing purchases and sales of said stock and keep all inventories and books securely locked in a fire-proof safe, or other place secured from fire in said store during the hours the same is closed for business. Failure to observe the above conditions shall work a forfeiture of all claims under this policy," which failure was intentional and for the purpose of defrauding the defendants, and without its consent, is bad on demurrer, because it does not allege that one year had elapsed after the making of the policy and before the fire occurred.

3. *SAME—Defenses—False Swearing, etc.*—A plea which sets up, as a defense to an action on a policy of insurance, false swearing by the insured, concerning matters which are not material under the provisions of the policy, is bad on demurrer.

4. *SAME—Pleas Which Do Not Amount to a General Issue.*—In actions upon policies of insurance, pleas setting up forfeitures under the conditions of the policies are not liable to the objection that they amount to the general issue under the practice in this State.

5. *SAME—Agreement of the Insured to Keep Books.*—An agreement by the insured in a policy of insurance upon a stock of merchandise to keep books is in the nature of a promissory warranty. It is not a condition or proviso, but an express agreement on the part of the assured to be construed like other agreements. A failure to comply with it forfeits all rights under the policy, unless waived.

6. *FORFEITURES—In Insurance Matters—Not Favored in Law.*—Forfeitures are not favored in law and equivocal expressions in policies of insurance are interpreted most strongly against the company for the reason that it prepared the contract.

7. *SAME—Change of Title—Insurance Mortgage.*—A chattel mortgage upon insured property is not a sale, or change of title, within the meaning of a clause in a policy which prohibits a transfer or change of the title without the consent of the insurer.

8. *POLICIES OF INSURANCE—Constructions of Conditions.*—A condition in a policy of insurance upon merchandise requiring the insured to take an inventory of the stock at least once a year and keep books of account correctly detailing purchases and sales, is evidently not intended to require the insured to take an inventory immediately upon obtaining the insurance under penalty of forfeiture.

9. *SAME—Provisions of, to Keep Books and Make an Inventory.*—The purpose for which an inventory is required to be taken and books kept under the provisions of a policy of insurance upon merchandise is that in case of a fire such inventory and books would show the exact loss or nearly so, and such provision is to be considered in its entirety as relating to that one purpose, and if the inventory is not required to be made immediately upon the receipt of the policy the keeping of the books is not.

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Assumpsit, on an insurance policy. In the Circuit Court of Massac County; the Hon. ALONZO K. VICKERS, Judge, presiding. Declaration upon a policy of insurance; the pleas are stated in the opinion of the court; judgment on demurrer to pleas; appeal by defendant. Heard in this court at the August term, 1894, and affirmed. Opinion filed March 23, 1895.

APPELLANT'S BRIEF, COURTNEY & HELM, ATTORNEYS.

A failure of the assured to keep books of account of the amount of his sales and purchases, when by the terms of the policy he agrees to do so, is fatal to his right of recovery. *Niagara Fire Ins. Co. v. Brown*, 123 Ill. 356; *Crigler v. Ins. Co.*, 49 Mo. App. 12; *Pelican Ins. Co. v. Williamson*, 53 Ark. 353; *Sun Ins. Co. v. Jones*, 54 Ark. 376; 18 *Ins. Law Journal*, 813.

These cases are full to the point. In the case *Niagara Ins. Co. v. Brown*, 123 Ill. 356, it was held that a non-compliance by the assured with this requirement would avoid the policy unless waived. Here, there is no question of waiver. Waiver must be alleged in the declaration or presented by way of replication. *Ins. Co. v. Vanlucce*, 126 Ind. 410; *Brown v. Ins. Co.*, 86 Ala. 189.

APPELLEE'S BRIEF, SPANN & SHERIDAN, ATTORNEYS.

A party claiming a forfeiture must bring himself within the clause of the policy to defeat the right. *Smith v. Mutual Fire Ins. Co.*, 50 Me. 96; *Masters v. Madison Ins. Co.*, 11 Barb. 624; *Rollins v. Columbia Ins. Co.*, 5 Fost. (N. H.) 204; *Ayers v. Hartford Ins. Co.*, 17 Iowa 180; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Lazarus v. Commonwealth Ins. Co.*, 19 Pick. 81; *Com. Ins. Co. v. Spankneble*, 52 Ill. 53; *Trumbull v. Portage Ma. Fire Ins. Co.*, 12 Ohio 365; *Jackson v. Mass. Ins. Co.*, 23 Pick. 478.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee brought suit on an insurance policy to recover damages for a loss occasioned by fire. The appellant interposed by pleas the defense, first, a failure to comply with the following provision of the policy: "It is

expressly warranted that the insured shall take an inventory of the stock hereby covered at least once a year, and shall keep books of account, correctly detailing purchases and sales of said stock, and shall keep all inventories and books securely locked in a fire proof safe or other place secured from fire in said store during the hours said store is closed for business. Failure to observe the above conditions shall work a forfeiture of all claims under this policy;" which failure, it is alleged, was intentional, for the purpose of defrauding the defendants, and without its consent; second, that plaintiff, in making his proof of loss, knowingly, willfully and corruptly swore falsely, in stating there was no incumbrance on said property; third, that after said fire the plaintiff refused, on request, to produce his books for inspection, as required by the provisions of said policy. A demurrer was interposed to these pleas, making the point on first plea that it does not allege one year had elapsed after the making of said policy before the fire occurred; on the second plea, that the matter therein set up, about which there was alleged false swearing, was not material under the provisions of the policy; that no forfeitures were declared by the defendant on account of the matters set up in said pleas, and that they amount to the general issue. The demurrer was sustained, on which ruling the defendant assigns error. The pleas did not amount to the general issue under the practice in this State. The introduction of the policy, with proof of loss, makes a *prima facie* case for the plaintiff. Ill. Fire Ins. Co. v. Stanton, 57 Ill. 354, 357; Continental Life Ins. Co. v. Rogers, 119 Ill. 485.

The defendant may, by pleas, set up its cause of forfeiture. Herron v. P. M. & F. Ins. Co., 28 Ill. 235. In doing so, however, it must plead every fact necessary to show a forfeiture. Ill. Fire Ins. Co. v. Stanton, 57 Ill. 354. The chattel mortgage on the goods did not operate to change the title within the terms of the policy. Aurora Fire Ins. Co. v. Eddy, 55 Ill. 213. The second plea, above referred to, does not so allege. The false swearing, in order to work a forfeiture, must be material. Vol. 2, Am. & Eng. En. of Law, p. 301. The demurrer to this plea was properly sustained. There

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is no use in considering the third plea above referred to, that plaintiff refused to produce his books. The evidence shows he kept no books and that question is raised by the first plea, which presents the principal question material to this case. The first plea is good in form. No objection is made on that ground. The only question is, does it set up a defense? The same question is raised by the evidence, for, as stated, the proof shows no books were kept by the appellee. The agreement to keep books is in the nature of a promissory warranty. *Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106, 108. It is not a condition or proviso, but an express agreement on the part of the assured, to be construed like other agreements, *Ibid*. A failure to comply with such an agreement would operate to forfeit all rights under the policy unless waived. *Niagara Fire Ins. Co. v. Brown*, 123 Ill. 356; *Crigler v. Ins. Co.*, 49 Mo. App. 12; *Pelican Ins. Co. v. Williamson*, 53 Ark. 353. The rule of law is that forfeitures are not favored. The right to a forfeiture is *stricti juris* (*Eddy case, supra*), and equivocal expressions in a policy are interpreted most strongly against the company, for the reason it prepares the contract. *Com. Ins. Co. v. Robinson*, 64 Ill. 268; *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644.

The provisions of the policy set up in this plea required appellee to "take an inventory of the stock * * * at least once a year, and keep books of account, correctly detailing purchases and sales of said stock." The policy was issued on the 4th day of February, 1887, and expired in one year. The fire occurred on the 13th day of April, 1887, or thirty-seven days after the policy went into effect. It evidently was not intended by the provision referred to, to require appellee to take an inventory immediately upon obtaining the insurance, under penalty of forfeiture. To so hold would be doing violence to the language used. It is well known that such is not the "course of business."

When such inventory, however, is once taken, and also a book account kept of the purchases and sales thereafter made, as contemplated by this provision, then in case of loss by fire such inventory and books would show the exact loss, or nearly so. This was the one and only purpose of the

provision in the policy. This provision, therefore, must be construed and considered in its entirety as relating to that one purpose. The means to effectuate that end were the requirements that appellee should take an inventory and keep books of account of purchases and sales. These requirements were not independent of each other, but interdependent. Therefore, if the former was not required to be done by the appellee immediately upon the receipt of the policy, the latter was not. The inventory was required to be taken once a year, which gave appellee the whole year within which to do it. Until done, the other dependent requirement did not become operative. The judgment is affirmed.

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59	613
58	166
74	649

Henry Herrmann and John Herrmann v. City of East St. Louis.

1. **DAMAGES—Public Improvements—Measure of, Where Property is Not Taken.**—In an action for damages against a city for constructing a viaduct in front of the plaintiffs' property, a general appreciation of property arising either from a particular cause or from independent causes, can not be allowed as a set-off against damages produced by the particular improvement.

2. **SAME—Appreciation in Value from Independent Causes—Not to be Considered.**—In estimating the damages done to lands by the erection of any public work, as a viaduct, any mere general and public benefit or increase in value received by the property in common with other lands in the neighborhood, should not be taken into consideration.

Trespass on the Case, for damages sustained by the erection of a viaduct. In the City Court of East St. Louis; the Hon. ALEXANDER W. HOPE, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict of not guilty; error by plaintiff. Heard in this court at the August term, 1894. Reversed and remanded. Opinion filed March 23, 1895.

BRIEF FOR PLAINTIFFS IN ERROR, KNISPEN & ROPIQUET,
ATTORNEYS.

The constitution of 1870 provides that private property shall not be taken or damaged for public use without just compensation. Constitution, Article 2, Sec. 13.

Under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by making and using an improvement that is public in its character. *C. W. & I. R. Co. v. Ayres*, 106 Ill. 518; *Bloomington v. Pollock*, 141 Ill. 348.

The owners of property bordering upon streets have, as an incident to their ownership to said property, a right of access by the way of the streets which can not be taken away or materially impaired by the city without incurring legal liability to the extent of the damage thereby occasioned. *City of Chicago v. Union Building Ass'n*, 102 Ill. 379.

An actual physical taking of property is not necessary to entitle an owner to compensation. To deprive him of the ordinary beneficial use or enjoyment of his property is in law equivalent to the taking of it, and is as much a taking as though the property were actually taken. *Lewis on Eminent Domain*, Secs. 53-9; *Tiedeman on Police Power*, p. 397; *Cooley, Con. Lim.*, 6th Ed., 670.

And whenever by reason of the disturbance of this right the owner sustains a special damage with respect to his property, in excess of that sustained by the public generally by the construction of a public improvement interfering with the easement appurtenant to his property, he is entitled to recover damages. *Rigney v. Chicago*, 102 Ill., pages 64-65; *Chicago v. Taylor*, 125 U. S. 167-9.

Damaging of property of abutting owners without their consent, by reason of the appropriation of the street to a particular use, is in every just sense a taking of private property of the abutting owner to the extent of which it is thus damaged. Property consists, not of the physical thing on which it is predicated, but in the dominion that is rightfully and lawfully obtained over it, the right to its use, enjoyment, and disposition. *Penn Mutual Life Ins. Co. v. Heiss*, 141 Ill. 35.

An interference with an easement to property whereby the same is impaired or destroyed should be treated like any other case of partial taking. *Lewis, Eminent Domain*, p. 651.

The action for damages may be regarded as in the nature of one kind of condemnation proceeding. *Chicago R. R. Co. v. Loeb*, 118 Ill. 214; *Penn Mutual Life Ins. Co. v. Heiss*, 141 Ill. 35.

The compensation is the special damage sustained with respect to his property, in excess of that sustained by the public generally. *Rigney v. Chicago*, 102 Ill. 64-65; *Penn Mutual Life Ins. Co. v. Heiss*, 141 Ill. 61.

And plaintiff is entitled to recover unless the benefits received from making the improvement are equal to or greater than the loss. *Shawneetown v. Mason*, 82 Ill. 337; *City of Elgin v. Eaton*, 83 Ill. 537.

The real question is, how much the property has been depreciated in value by the construction of the public improvement. *Springer v. City of Chicago*, 135 Ill. 560, and cases cited.

In respect to property not taken, but damaged merely, it is the amount of damage, less the benefit incurred. It is the net benefit which should be deducted from the damage produced by the improvement, and the sum remaining will represent the just compensation which he will be entitled to. This will be usually more than the difference in market value. *City of Bloomington v. Pollock*, 38 Ill. App. 133; 141 Ill. 352.

The question of damages is to be determined with reference to special benefit only, to property not taken. Any mere general and public benefit or increase of value received by the land in common with other lands in the neighborhood is not to be taken into consideration in estimating damages. *Village of Hyde Park v. Blake*, 116 Ill. 167; *C. & E. R. Co. v. Blake*, 116 Ill. p. 169.

Where part of a tract is taken, just compensation would, therefore, consist of the value of the part taken and damages to the remainder, less any special benefit to such remainder; a sum of money which makes the owner whole and leaves him in as good a situation as his neighbor, no part of whose property has been taken. *Lewis, Eminent Domain*, Par. 471; *Keithsburg R. R. Co. v. Henry*, 79 Ill. 290; *Parks*

v. Hampden, 120 Mass. 395; Hilbourne v. Suffolk, 120 Mass. 393.

In making the estimate there must be excluded from consideration those benefits which the owner receives only in common with the community at large. Cooley, Con. Lim., 567-70; Roberts v. Comrs. Brown Co., 21 Kan. 247; Lewis on Eminent Domain, Par. 436; 4 Leading Cases American Real Prop., p. 478 and cases cited.

The general appreciation of property belongs to the property owner, and a railroad company is not entitled to the consideration of that element in the ascertainment of the compensation it must pay to the abutting proprietor. Allen v. Charlestown, 109 Mass. 243; Parks v. County of Hampden, 120 Mass. 395; Hilbourne v. Suffolk, 120 Mass. 393; Cross v. Plymouth, 125 Mass. 557.

The question is, what has been the actual result upon the land remaining; has its actual market value been decreased by the taking, or has the taking prevented an enhancement in value greater than has actually occurred, and if so to what extent? The absence of injury may have been the result of the general growth of the city by reason of which the particular property has grown in value with the rest of the city. Where it appears that property left has actually advanced in value, unless it can be shown that, but for the act of defendant in taking these easements, it would have grown still more in value, it has not been damaged. It is only necessary for us in this case to decide that, if the property of plaintiffs has increased in value since the taking of these easements, or a portion of them, and if such increase is largely due to the building and operation of the defendant's road, and if such increase would not have been greater but for the action of defendant, then the plaintiffs have suffered no damage. Bohm v. Metropolitan Electric Ry. Co., 129 N. Y. 576.

The general increase of value, resulting from the growth of public improvements, railroads, canals and highways, accrues to the public benefit, and in the computation of damages the land owner can not be charged therewith. The

question in each case is whether or not the special facilities afforded by the improvement have advanced the market value of the property beyond the mere general appreciation of property in the neighborhood. *Setzler v. Pennsylvania Schuylkill R. R. Co.*, 112 Pa. St. 56.

COCKRELL & MOYERS, attorneys for defendant in error.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Henry and John Herrmann sued the city of East St. Louis in an action on the case for damages to their property, situated in that city, arising from the construction of a viaduct in and over the street in front of their property for the use of the traveling public in crossing Cahokia creek and certain railroad tracks. The viaduct in front of the property in question was eighteen feet above the grade of the street and thirty-six feet wide, and was calculated to cut off free access to the property and in many other ways to interfere with the use and enjoyment thereof. A verdict was returned in favor of the city, and this appeal has been prosecuted from the judgment rendered on that verdict.

The record is voluminous, but the case may be disposed of without a detailed statement of the evidence produced upon the trial.

The court, at the request of the city, gave the following instructions to the jury:

"The court instructs the jury that the question to be determined is whether the property in question has been damaged by the viaduct; if not, then there can be no recovery. If the jury believe from the evidence said property was worth as much after said viaduct was built as before, then no damage can be said to have accrued thereto. There can be no damage to property without a pecuniary loss. If there has been no depreciation in the market value of the property, there is no damage and should be no recovery."

"The court instructs the jury that the measure of damages is confined to the difference between the market value

of the property just before and after the building of the viaduct in question. And if the jury believe from the evidence that the market value of the property now is the same or greater than just before building the viaduct then the jury will find for the defendant."

The measure of damages thus laid down was reiterated in other instructions given at the request of the city, and the instructions given for the Herrmanns were so modified as to announce the same doctrine. In fact, the rulings of the court on this point were consistent throughout the trial. In passing upon the evidence it was repeatedly stated and held by the court that the measure of damages was the difference between the market value immediately before and immediately after the construction of the viaduct, and this, although the construction of the viaduct may have been an absolute damage, and the market value may have been kept up, in spite thereof, by the general appreciation of property resulting from other causes.

The Herrmanns contended that extensive improvements, aside from the building of the viaduct, were in progress in the city, the effect of which was to enhance the value of property very considerably; that if these improvements had not been made, the building of the viaduct would have caused the property of the Herrmanns to become greatly depreciated in value; and that it was only because of the general appreciation of property from all these improvements, that appellant's property in question continued to be worth in the market as much after the viaduct was built as before.

Some evidence tending to support this theory crept into the record, notwithstanding the vigilance of the court in excluding such evidence from the jury. Some such evidence was excluded by the court of its own motion, against the objection of plaintiffs in error. The case may be properly considered on the theory that there was evidence actually before the jury, or which would have been before the jury but for the rulings of the court, tending to show that extensive improvements, other than the building of the viaduct

in question, were going on in the city, whereby there was a general rise of value throughout the city, affecting the property of plaintiffs in error, and that but for this general appreciation of values, the property in question would have been worth less after the construction of the viaduct than before.

If these are the actual facts, why are not the Herrmanns entitled to damages? All other citizens enjoy the benefit of a general rise of values; but these two, whose property receives no special benefit, who pay taxes for the general improvements, are to be shorn of their advantages from general appreciation by having such increase of value set off against their special damages. That is to say, as has been suggested in the argument, if a certain man has one hundred bushels of corn worth fifty cents per bushel, and another takes fifty bushels from him, the owner is not damaged provided the price of corn should increase to one dollar per bushel! Can this be the law? We think not.

It may be admitted that in many cases the difference in market value before and after the improvement, furnishes a sufficiently accurate rule for the ascertainment of the damages. Generally, the property does not rise in value to any appreciable extent from other causes during the progress of the work which produces the damages. But suppose a case in which the general growth of the city doubles the value of the property while the particular work is progressing; is the owner to have this general enhancement of values set off against his special damages? Is it more in accordance with the principles of justice to say that, inasmuch as the damages to which one is entitled must be special damages to his property from the particular work, and not damages suffered by the community generally, or arising from other causes, so the benefits set off against such special damages must be special benefits, and not a general appreciation of property arising either from the particular work, or from independent causes.

It seems to be the well settled law of this State that any mere general and public benefit or increase in value re-

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ceived by the property in common with other lands in the neighborhood, should not be taken into consideration in estimating the damages. Page et al. v. C., M. & St. P. Ry. Co., 70 Ill. 324; C. & E. R. R. Co. v. Blake, 116 Ill. 163; Village of Hyle Park v. Washington Ice Co., 117 Ill. 233; Washington Ice Co. v. City of Chicago, 147 Ill. 327; City of Bloomington v. Pollock, 38 Ill. App. 133, affirmed in 141 Ill. 346.

The case of Springer v. City of Chicago, 135 Ill. 552, holds no more than that, in estimating benefits and damages to property not taken, the whole of the particular improvement should be considered, on the ground that part of it might prove a damage, while the entire improvement might prove a benefit. This is but fair, and in no manner contravenes the view of the law announced in this opinion, in which it is held that a general appreciation of property, arising either from a particular work or from independent causes, can not be allowed as a set-off against damages produced by the particular improvement.

For the errors indicated the judgment is reversed and the cause is remanded.

**Kingman & Co., a Corporation, etc., v. H. G. Reinemer
and Phillip Knebel, Partners, under the Name
of H. G. Reinemer & Co.; H. G. Reinemer and Phillip Knebel.**

George Hotz, Sheriff of Madison County, v. Frederick W. Fritz, Assignee of H. G. Reinemer & Co.

1. **FRAUD**—*In Procuring the Execution of Judgment Notes.*—Where the members of a firm, being insolvent, were induced by the agent of one of its creditors to execute judgment notes for the amount of the indebtedness due him, under the impression that they were ordinary promissory notes, and in ignorance of their true character, upon a motion made by the assignee of said firm (it having made an assignment after the execution of said notes) to set aside a judgment entered upon said note, it was held that the court hearing the motion was justified in find-

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ing that the making of said notes was obtained by fraud of the agent, with the intention of obtaining a judgment and immediate execution, seizing the property of the firm, selling the same, and applying the proceeds to the payment of his principal's debt, to the exclusion of other creditors.

2. *SAME—Precaution in Signing Promissory Notes.*—The fact as to whether the makers of a promissory note, alleged to have been obtained by fraud, exercised proper precaution and examined the note before signing, is a question of fact for the court when trying the issue without a jury.

3. *DEMAND—When Not Necessary in Replevin.*—When the defendant in replevin pleads the general issue, property in himself and in third parties whose bailiff he is, avows the taking and demands a return, it is not necessary for the plaintiff to prove a demand for the goods previous to the issuing of the writ of replevin.

4. *JUDGMENTS BY CONFESSION—Motion to Vacate—When to be Filed.*—A motion to vacate a judgment filed at the next ensuing term of court after the confession of the judgment in vacation is in apt time.

5. *SAME—Upon Void Notes.*—A judgment note obtained by the fraud of an agent of the payee, is void, and no recovery can be had upon it as against the makers by the payee. A judgment entered upon it is illegal.

6. *EXECUTION—Upon Fraudulent Judgment.*—An execution issued upon a judgment obtained by fraud, is also tainted with the original fraud, and can not be used by the plaintiffs in the judgment as a means to effectuate the fraudulent purpose. Nor will it justify the sheriff in taking the goods of the defendant under it.

Replevin and Motion to Vacate Judgment, entered upon a judgment note. In the Circuit Court of Madison County; the Hon. GEORGE W. WALL, Judge, presiding. Declaration in replevin. Pleas (1) *non cepit*; (2) *non detinet*; (3) property in a third party; (4) property taken by virtue of an execution, etc.; (5) property in the defendant. Trial by the court without a jury; finding and judgment for plaintiff; appeal by defendants. Submitted at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

STATEMENT OF THE CASE.

In June, 1893, Reinemer & Co., hardware merchants at Grantfork, Illinois, found they were indebted to such an extent that they could not continue business without assistance, and arranged with a number of their friends, men of means, to form a corporation, take the firm's stock of goods at a stipulated price, pay all debts of said firm then due, and the other debts as they matured, and among others a debt of about \$4,950, owing to Kingman & Co., of which only

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about \$1,400 was then due, a small part of the balance becoming due July 1st, and the residue on September 1, 1893. All arrangements for the organization of the corporation had been made. Money had been provided for to pay the matured indebtedness, and on June 22, 1893, a committee of the stockholders, appointed for that purpose, were engaged with members of the firm in invoicing the goods. While thus engaged, Roberts, an agent of Kingman & Co., came in the store, and after some talk with Reinemer and his partner, Knebel, induced them to execute two notes of that date, one for \$1,424.34, due July 1, 1893, the other for \$3,536.27, due September 1, 1893, each bearing seven per cent interest. These notes turned out to be judgment notes, and on the next day Roberts caused a judgment by confession to be entered before the clerk in vacation, on said notes, in favor of Kingman & Co., for \$5,450.06 and costs, and on the same day, June 23d, ordered execution to be issued thereunder to the sheriff, who on the evening of that day levied it on the entire stock of Reinemer & Co., and all further proceedings by said corporation were stopped.

On June 26 and 27, 1893, deeds of assignment to F. W. Fritz were executed by said firm of Reinemer & Co., the individual members thereof conveying all the firm and individual property and assets not exempt, for the benefit of their creditors under the statute, and all the necessary steps were taken as required by the statute to invest the assignee with the title, right of possession and control of the property and assets so conveyed.

At the October term, 1893, it being the first term of the Circuit Court of said county held after the said confession of judgment, a motion in writing was made by Reinemer & Co., F. W. Fritz, assignee, and creditors of said firm, to vacate said judgment. This motion set forth several reasons why said judgment should be vacated and set aside, and was supported by affidavits. The principal and most conclusive reason so set forth is, that the making of said firm notes, for which the judgment was confessed, was obtained by the fraud of Roberts, the agent of Kingman & Co. At

said term the motion was continued to the March term, 1894.

On June 27, 1893, the assignee filed his affidavit, and caused a writ of replevin to be issued to the coroner against said sheriff, for the stock of goods levied upon under the execution mentioned, and the assignee having furnished and delivered to the coroner the necessary replevin bond, the writ of replevin was executed by taking and delivering to the assignee the said stock of goods, and summoning the sheriff to appear at the October term, 1893, of the Madison Circuit Court, at which term the cause was continued to the March term, 1894, of said court. At the March term the motion to vacate and the suit in replevin were consolidated and tried by the court by agreement without a jury. Evidence was introduced and heard by the court on behalf of the several parties, and the court was requested on behalf of Kingman & Co., to hold propositions No. 1 to No. 8, inclusive, to be the law.

The several propositions and the ruling on each are as follows:

First. The court is asked to declare the law to be: That if Reinemer & Co., and Reinemer and Knebel, as individuals, knew that they were signing a judgment note at the time they signed the notes in controversy, then the judgment of the court should be a dismissal of the motion to vacate the judgment herein, and the judgment should be entered for the defendants in the replevin suit. (Held.)

Second. The court is asked to declare the law to be: That it was the duty of Reinemer & Co., and Reinemer and Knebel, as individuals, to read the notes before they signed them, and if they did not do so they will still, as a matter of law, be presumed to know what was contained in the notes at the time they signed them, in the absence of proof to the contrary. (Held.)

Third. The court is asked to declare the law to be: That if Reinemer & Co., or as individuals, signed the notes in question, unless fraud be shown by a preponderance of evidence, the judgment of the court should be for the dis-

missal of the motion to vacate the judgment and judgment for the defendant in the original replevin suit. (Held.)

Fourth. The court is asked to declare the law to be: That no one in the motion herein to vacate the judgment can have any standing except Fritz, the assignee of Reinemer & Co. And if Reinemer & Co., or Reinemer and Knebel as individuals, could not take advantage of this motion, then no others can. (Held.)

Fifth. That although it may appear from the evidence that at the time of the execution of the notes, Roberts, the representative of Kingman & Co., said to Reinemer and Knebel that they could have further time, yet unless it appears that said Roberts had authority to bind Kingman & Co. by such promise, the judgment of the court should be that the motion to vacate judgment should be dismissed and judgment for defendant in replevin suit. (Refused.)

The conclusion does not necessarily follow.

Sixth. The court is asked to declare the law to be: That Reinemer and Knebel are presumed as a matter of law to have read the notes herein before they signed them, in the absence of proof to the contrary. (Held.)

Seventh. The court is asked to declare the law to be: That before the judgment herein can be set aside for fraud, fraud must be conclusively shown from the evidence. (Refused.)

It is enough if the fraud alleged be established by the preponderance of proof.

Eighth. That before the judgment can be set aside for fraudulent representations made by Roberts to Reinemer and Knebel it must further appear from the evidence that such fraudulent misrepresentations induced the execution of the notes, and but for such fraudulent representations said Reinemer and Knebel would not have signed them. (Held.)

The court sustained the motion, set aside and vacated the judgment by confession, found the issues in the replevin suit for the plaintiff, ordered that he retain possession of the property replevied, and entered judgment against defendant for costs. An appeal in each case was taken, and by

agreement one appeal bond applying to the two appeals was filed. The cases are consolidated, and to be heard and decided in this court together.

DALE, BRADSHAW & TERRY, attorneys for appellant.

C. L. COOK and TRAVOUS & WARNOCK, attorneys for appellees.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

The means by which the makers of the judgment notes were induced to execute them, is the vital, controlling question involved, touching which there is a conflict of evidence. We are of the opinion the court was warranted in finding, by a preponderance of the evidence, that Roberts was an agent of Kingman & Co., and was apprised on the 21st of June, 1893, by Knebel, of the organizing of the corporation as mentioned in the preceding statement. That on the evening of that day he informed Kingman & Co. of that fact, and was instructed to go back to Grantfork and get money, security or judgment notes from Reinemer & Co. for the amount of their indebtedness, and in accordance with this instruction did go back on June 22d to the store of Reinemer & Co., and found there the committee appointed by said corporation, and both members of said firm busily engaged in invoicing the goods. That a part only of the firm debt to Kingman & Co., about \$4,950, was then due; a small part of the balance was due July 1, 1893, and the residue September 1, 1893.

That Roberts importuned Reinemer to settle this indebtedness by notes, maturing July 1st and September 1st, for the reason his firm wished to close up this account before the corporation took hold, and would not push the collection of the notes but would give two or three weeks extension if not paid at maturity. That Reinemer finally consented, and said he would get some blank notes of the kind the firm had usually given Kingman & Co., fix the matter

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up and give security; but Roberts replied that would not be necessary, as he had some of the same kind of blank notes, and did not want any security; and Roberts then went into the private office, fixed up a settlement sheet with the book-keeper, filled up the judgment notes, and Reinemer and Knebel were called in and signed the same without examination, relying upon the honesty of Roberts and the truthfulness of his representations as to the character and contents of the notes, each believing them to be ordinary promissory notes, such as they had been in the habit of giving Kingman & Co., due July 1st and September 1st, respectively, and not knowing they were judgment notes, and not intending to execute notes of that character. The evidence justified the conclusion that the making of said notes was obtained by the fraud of Roberts, with the purpose of obtaining a judgment and immediate execution, seizing the entire stock, selling the same thereunder, and applying the proceeds to the payment of the debt of Kingman & Co., to the exclusion of other creditors.

It is said, however, on behalf of appellants, that Reinemer and Knebel did not exercise proper precaution and examine the notes before signing, and hence, can not be heard to dispute their validity. This was a question of fact for the court acting in place of a jury. *Taylor v. Atchison*, 54 Ill. 196; *Leach v. Nichols*, 55 Ill. 273; *Munson v. Nichols*, 62 Ill. 111.

The evidence shows that intimate business relations had existed for years between said firm of Reinemer & Co. and Kingman & Co. That they had never been asked by the latter firm to give a judgment note, and both parties were busy and in a hurry, and Roberts claimed he was anxious to get away at the time the notes were executed, and there was nothing in his manner, or statements to them, that would awaken distrust, but everything justified them in relying upon his honesty, and the integrity of the firm who sent him, to protect them from imposition or fraud in a business transaction, and the court could properly find the makers of the notes were not guilty of negligence in view

of all the surrounding circumstances. It is also claimed that no demand was made of the sheriff by Fritz for the goods before commencing the replevin suit. Under the pleadings and evidence no demand was necessary. *Butters v. Haughwout*, 42 Ill. 18; *Hardy v. Keeler*, 56 Ill. 152; *Farwell v. Hanchett*, 120 Ill. 573.

There was no error in refusing to declare the law to be as requested in the refused propositions, and in modifying those which were modified, and those which the court held to be the law were quite as favorable to appellants as they had the right to demand. The motion to vacate the judgment was filed at the next ensuing term of court after judgment was confessed, and was filed in apt time. The conclusion reached by us is that the execution of the judgment notes having been obtained by the fraud of the agent of the payee, they were void, and no recovery could be had therefor, as against the makers, by the payee. Hence, the judgment entered in vacation was illegal and was properly vacated and set aside on the motion of appellees. The execution, issued to satisfy a judgment obtained by fraud, is also tainted with the original fraud and can not be availed of by Kingman & Co. and used as a means to effectuate the fraudulent purpose. Hence, said writ did not justify the taking of the stock of goods by the sheriff, and the issues in the replevin suit were properly found in favor of the plaintiff, and the order and judgment of the court on the finding was right. By this finding and judgment, and the order vacating and setting aside the judgment confessed, justice to all the parties is secured. The debt of Kingman & Co. is filed as a claim against the insolvent estate, the net proceeds of which will be used for the payment of that claim and the other indebtedness of the insolvent firm, without preference or undue advantage being given to any creditor.

The order and judgment on the said motion and judgment in the replevin suit are affirmed.

Illinois Central Railroad Company v. Matilda Robinson.

1. **VERDICTS—*Affidavits of Jurors—Competent to Sustain.***—When a juror in his counter-affidavit contradicts charges of misconduct on his part, made in affidavits read in support of a motion for new trial, the court will be sustained in denying the motion.

2. **DAMAGES—*Questions for the Appellate Court.***—The Supreme Court has uniformly held, since the organization of Appellate Courts, that the measure of damages in actions for personal injuries is a question to be finally settled by these courts, and decline to interfere, either upon the ground that the damages assessed are inadequate or excessive.

3. **ELEMENTS OF DAMAGES—*Suffering in Body and Mind.***—Where suffering in body and mind is the result of injuries caused by negligence, it is proper to take them into consideration in estimating the amount of damages.

4. **COMPENSATORY DAMAGES—*For Personal Injuries.***—Compensatory damages recoverable for personal injuries are not limited to those injuries which impair or destroy the ability of the person injured to earn money for his own support or for the support of his family, but in estimating such damages, pain and suffering, shattering of the nervous system, permanent physical injuries reducing one to the condition of a physical wreck and hopeless invalid, incapacitated to enjoy the pleasures of life, whether the injured was a wage earner or not, are proper elements to be considered by the jury in assessing damages and the court in entering judgment on the verdict.

5. **EXCESSIVE DAMAGES—*What Are Not.***—When an unmarried woman, thirty-five years of age, enjoying excellent health, strong and active, her physical condition unimpaired, received injuries, from the result of which she suffered great pain, and became and continued unable to endure fatigue or take active exercise as she had been accustomed, and her nervous system is permanently shattered, a verdict of \$7,000 is not excessive.

6. **VERDICTS—*The Result of Passion or Prejudice.***—On appeal, a court of review seldom substitutes its judgment on the question of damages in cases of personal injuries for that of the jury and court below, and ought not to do so without it is apparent that the jury were influenced by passion or prejudice in making the assessment.

7. **TRIALS—*Conclusions from Statements of the Trial Judge.***—It does not follow because the court stated after argument on the motion for a new trial that the damages assessed by the jury were excessive and that a portion must be remitted, that for such reason alone the amount of damages found was too great, or that the verdict ought to be set aside.

8. **REMITTITUR—*Practice of Entering.***—The practice of refusing to enter judgment upon verdicts unless a portion is remitted, is so common and such action so promotive not only of justice but of an ending of

litigation, that it is almost essential to the proper conduct of a jury trial that the court should possess such power.

Trespass on the Case, for personal injuries. Appeal from a judgment of the Circuit Court of Marion County; the Hon. GEORGE W. WALL, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict of guilty. Appeal by the defendant. Submitted at the August term, 1894. Affirmed. Opinion filed March 28, 1895.

STATEMENT OF THE CASE.

Appellee brought this suit to recover damages for personal injuries received by her while being carried as a passenger on appellant's train, March 22, 1892. The cause was tried by a jury, who returned a verdict finding defendant guilty and assessing plaintiff's damages at \$9,500. Defendant entered a motion for a new trial, and afterward, on February 26, 1894, after the motion was argued, the court stated the damages were excessive, and unless the plaintiff would remit \$2,500 thereof a new trial would be awarded. Thereupon plaintiff's attorney entered a remittitur of \$2,500, and the court overruled the motion for a new trial, and entered judgment for \$7,000 and costs for plaintiff. Defendant took this appeal.

WILLIAM H. GREEN, attorney for appellant.

HOFF & HOFF and J. P. JEFFRIES, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

It is not claimed on behalf of appellant that the negligence charged was not proven, or denied that personal injuries to appellee resulted therefrom. But we are asked to reverse the judgment for one, or all, of the following reasons: "First. The prejudice of the jurymen Whitechurch, as shown by Hallam's affidavit, and the conduct of the jury as shown in the affidavit filed by appellee, are cause for a new trial."

"Second. The damages are vindictive and excessive, and therefore the verdict should have been set aside."

"Third. The statement of the court to the jury that the damages were excessive, and that in order to prevent the granting of a new trial the sum of \$2,500 should be remitted, and the entering by appellee of a remittitur of \$2,500, show that the verdict was not the verdict of the jury and should have been set aside."

As to the first reason, Hallam in his affidavit states, "that on January 17, 1894, said juror stated to affiant, 'I am prejudiced against the railroad company' (meaning the above defendant) 'and I don't deny it.' And he gave affiant to understand that said prejudice was pre-existing." Whitechurch, in his counter affidavit, flatly contradicts Hallam, and says he felt friendly to appellant and states why he felt so; and that part of his affidavit showing the difference of opinion expressed by the jurors during their retirement, at different times, as to proper measure of damages, even if proper to be considered, as tending to impeach the verdict, does not disclose unusual, or improper conduct on the part of the jury, but rather a free interchange of thought and fair discussion of a material question, to the end of reaching a conclusion all would agree was fair under the evidence. We see nothing in the first reason assigned requiring the reversal of the judgment. The second reason raises the question, what is the proper measure of damages under the established facts?

Appellee was an unmarried lady, thirty-five years of age, without any trade or occupation, living with her parents in Virginia. Before she received the injuries complained of, she enjoyed excellent health, was strong and active, and her physical condition unimpaired by any ailment or infirmity. As a result of said injuries, she suffered great pain for a long period, and yet at times suffers pain; she became, and continues to be unable to endure fatigue, or take active exercise as she had been accustomed to, and her nervous system is permanently shattered.

We have collated the following cases, some from each of the appellate districts of the State, affirming judgments for damages in cases like this, in amounts nearly approximating

the judgment in this case, and in several instances much larger. We have not cited decisions of the Supreme Court on this point because that court has uniformly held, since appellate courts have been organized in this State, that the measure of damages in actions like this is a question to be finally settled by the Appellate Court, and decline to interfere either upon the ground that the damages assessed are inadequate or excessive.

Where suffering in body and mind is the result of injuries caused by negligence, it is proper to take them into consideration in estimating the amount of damages.

In *Chicago City Ry. Co. v. Wilcox*, 33 Ill. App. 453, \$15,000 were assessed as damages for the injury to a child. The court says these damages are large; that appellee is entitled to full compensation, not limited to making good the probable pecuniary loss to him of a leg; his life is wrecked, whether for business or for pleasure.

In *Penn. Co. v. Backes*, 35 Ill. App. 375, appellee's arm was crushed and had to be amputated. Jury found defendant guilty, and assessed damages at \$6,000. The court declined to disturb the verdict.

In *L. S. & M. S. Ry. Co. v. Hundt*, 41 Ill. App. 220, plaintiff was a boy, eighteen years old, and in the service of appellant; earned \$1.25 per day. He was severely injured; three of his fingers were amputated, the fourth rendered useless; the jury awarded \$8,500 damages; plaintiff remitted \$1,000 and took judgment for \$7,500. Court says that the damages are liberal, above the amount usual in such cases. The appellee is not entitled to vindictive damages, only compensatory; but the law confines to the jury the fixing of the compensation, and they are not restricted to the pecuniary loss. We would not be justified in disturbing the verdict on the ground of excess.

In *M. & O. v. Godfrey*, 52 Ill. App. 564, court say, damages are claimed to be excessive. Evidence shows appellee is a physical wreck since his injury; before that time he was a sound, healthy man. It is very difficult to measure the damages for such an injury. On appeal, courts seldom sub-

stitute their judgment for that of the jury in estimating them without it is apparent the jury was influenced by prejudice or passion. There is nothing in this record to indicate the jury was so influenced, without it is to be found in the amount of the verdict returned; while that amount is large, yet in view of the helpless condition of appellee and the pain and suffering he endures, we do not feel that we should substitute our judgment for that of the jury and the court below.

In *M. & O. R. R. Co. v. Harmes*, 52 Ill. App. 650, appellee was a brakeman in the employ of appellant; damages, \$5,000, claimed to be excessive. It is said this is a question for the jury to determine; unless the amount is so large as to indicate the jury in fixing that amount were influenced by prejudice or passion, the verdict given could not be set aside on the ground of excessive damages. The jury saw the injured arm and character of the mutilation and heard the testimony of the plaintiff touching the pain and suffering that he had undergone and still suffered from his injury, and we can not say, in view of the evidence, the amount assessed was too large.

In *Chicago Anderson Pressed Brick Co. v. Renbaiz*, 51 Ill. App. 554, appellee was injured by having his hand caught in a defective machine of his employer; the jury assessed the damages at \$12,500, of which sum \$2,500 was remitted on suggestion of the court. In the opinion it is said the verdict was, and the judgment is, for a large sum, but not so large as to shock our sense of remedial justice.

The judgment is the act of the judge of the court before whom the cause was tried, and there is more than the usual evidence of a careful consideration of the sum for which judgment should be rendered, as the court below did not enter judgment for the entire amount of the verdict, and we do not feel warranted in interfering with the conclusions of the trial court, and its judgment is affirmed.

In *I. C. R. R. Co. v. Wheeler*, 50 Ill. App. 205, appellee recovered \$6,000 for injuries sustained while alighting from

one of appellant's trains. He was seventy-two years of age and was somewhat crippled and infirm in consequence of a previous injury. The evidence tended to show that appellee up to the time of the injury was possessed of his normal powers of articulation and speech; was a good penman; but that because of the injury these several faculties were to a considerable extent impaired; that his power of moving about was impaired; he has continuous pain, and his capacity to sleep has been seriously interfered with; and the judgment was affirmed, the court holding the damages were not so excessive as to warrant a reversal on that ground alone.

In *Goldie v. Werner*, 50 Ill. App. 297, appellee, a carpenter, while working for appellant, was seriously injured by the giving way of a scaffold over which he was carrying a heavy piece of lumber. The verdict was for \$20,000; a remittitur of \$12,500 was entered to prevent the granting of a new trial; it was urged the giving of so large a verdict and requiring of so great a remittitur, are evidence that the verdict was the result of passion or prejudice, and so regarded by the trial court. Appellee was injured permanently, crippled and disabled for life.

What sum is a proper compensation for his injury is a matter concerning which men and jurors will differ largely. We do not think that the very large sum shows that the jury was actuated by prejudice or passion. In a certain sense, there is no adequate compensation for such injuries as the plaintiff received. The law has regard to human infirmities as well as man's necessities; it forbids the judge to sanction a verdict he deems unjust, but it does not require that he refuse to add his judgment, soberness and experience to the decision of the jury, and in so doing, to award a result more equitable than either setting aside or wholly affirming a verdict.

In *J., A. & N. Ry. Co. v. Velie*, 36 Ill. App. 450, appellee was conductor and acted as brakeman for appellant, and was run over by engine of appellant; his injury was severe; the flesh of the leg was shoved up and pushed back, and the

foot was crushed, and he was crushed in the chest, and the ribs were torn loose from the breast bone; he is incapacitated from ever doing any labor, and has suffered great pain; his nervous system is so shattered that he is a perfect wreck. Verdict, \$14,000 damages, held not to be excessive.

In *C. M. & St. P. Ry. Co. v. Yando*, 26 Ill. App. 601, \$5,000 damages sustained. In *C. M. & St. P. Ry. Co. v. Harper*, 26 Ill. App. 621, verdict for \$5,000 sustained. In *C., B. & Q. R. R. Co. v. Sullivan*, 21 Ill. App. 580, judgment for \$5,000 damages affirmed. In *C. & E. I. R. R. Co. v. Holland*, 18 Ill. App. Report, 418, appellee was injured by a collision of the train in which he was a passenger, and the train of another railroad company; he was thrown against the back of a seat and seriously and permanently injured; \$25,000 were assessed for the injuries. The plaintiff at the time of the injury was a healthy, robust man; age, thirty years; his injuries incurable; nervous prostration and debility; this condition has manifested itself in continuous suffering, in great nervous excitability, loss of appetite, and an almost complete and permanent loss of the use of his feet and lower limbs, etc.; damages held not to be excessive. The judgment of the court affirmed.

From the rulings in these cases the fair deduction is that compensatory damages recoverable for personal injuries, are not limited to those injuries which impair or destroy the ability of the person injured to earn money for his own support or for the support of his family, but in estimating such damages, pain and suffering, shattering of the nervous system, permanent physical injuries, reducing one to the condition of a physical wreck and hopeless invalid, incapacitated to enjoy the pleasures of life, whether the person injured was a wage earner or not, are proper elements to be considered by the jury in assessing damages, and by the court in entering judgment on the verdict; and on appeal, the court of review seldom substitutes its judgment on the question of damages in cases of this character, for that of the jury and court below, and ought not to do so with-

out it is apparent the jury were influenced by prejudice or passion in making the assessment.

As regards the third reason assigned, we do not think it follows, because the court stated after the argument on the motion for a new trial (but not to the jury, as counsel for appellant say) that the damages for \$9,500 were excessive, and that \$2,500 must be remitted, leaving the amount \$7,000, that for such reason alone the judgment was for too much, or that the verdict ought to be set aside. In *Libby et al. v. Scherman*, 50 Ill. App. 131, it is said as to the action of the court in requiring a remittitur of \$3,500 to be made under penalty of granting a new trial, "We do not think that appellant can complain of such action; the practice of refusing to enter judgment upon verdicts unless a portion thereof is remitted, is so common, and such action so promotive not only of justice, but of an ending of litigation, that it is almost essential to the proper conduct of a jury trial, that the court should possess such power." See also *I. C. R. R. Co. v. Eberet*, 74 Ill. 399. Having thus disposed of the reasons assigned for reversal adversely to appellant's contention, and perceiving no good or sufficient reason for reversal, we affirm the judgment.

Edward McGuire, Assignee, etc., v. M. C. Campbell.

1. **JUDGMENTS BY CONFESSION**—*Power of Courts to Open—Usury.*—A court of law has power to order the opening of a judgment rendered upon a cognovit, where usury is alleged to constitute a part of the judgment, hear the parties and reduce the amount of the judgment, or set it aside altogether.

2. **SAME—Powers of the Court.**—When a judgment by confession by warrant of attorney is opened and the defendant allowed to plead, the court has no power to require as a condition precedent that the defendant bring into court the money supposed to be due, but the judgment may be allowed to stand as security until after the trial of the issues tendered by the defendant.

3. **USURY—Established by Verbal Testimony.**—Verbal testimony is admissible to establish the fact of a usurious contract.

McGuire v. Campbell.

4. **USURIOUS CONTRACTS**—*What is, Within the Statute.*—If a usurious contract is made, whether express or implied, at the time of or subsequent to the entering into the agreement to take and receive more than lawful interest, it is such an agreement as is within the purview of the statute.

5. **USURIOUS INTEREST**—*Once Paid Can Not be Recovered Back—Exception.*—The rule that usurious interest once paid voluntarily, can not be recovered back, does not apply where the transaction has not been settled and closed, and the lender brings suit to recover an alleged balance. In such cases the borrower may defend by claiming a credit for whatever usurious interest he has paid in the same transaction.

6. **USURIOUS TRANSACTIONS**—*New Notes Given.*—The fact that new notes have been given from time to time, does not change the case.

7. **USURY**—*Penalty for Reserving.*—The effect of contracting for or reserving usurious interest, whether by verbal or written contract, is the forfeiture of all the interest.

8. **PRACTICE**—*In the Appellate Court.*—Reasons for a reversal, which were not among the grounds for a new trial, will not be considered. The appellant is confined to the grounds stated, and must be held to have waived all causes not set forth.

Assumpsit, on a promissory note. Confession of judgment; motion to open; plea of usury; appeal from the Circuit Court of Williamson County; the Hon. JOSEPH P. BOBARTS, Judge, presiding. Heard in the Circuit Court at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

STATEMENT OF THE CASE.

At the February term, 1894, of the Williamson Circuit Court, judgment in favor of appellant against M. C. Campbell was entered by confession, upon a note and cognovit, for \$2,028.99. The note is as follows:

"\$1,374.80. One day after date we, or either of us, promise to pay to the order of Richart & Campbell the sum of thirteen hundred seventy-four and eighty one-hundredths dollars, and in case the said sum shall not be paid when due, we hereby authorize and empower any attorney at law of the State of Illinois to appear before any court of record and confess judgment for the above mentioned sum and eight per cent from maturity, and a reasonable attorney's fee, and to release all errors, and waive all proceedings in the nature of a stay of execution, appeal or petition in error. Payable at the banking house of Richart & Campbell, Carbondale, Illinois.

In witness whereof we have hereunto subscribed our names, and affixed our seals, this 1st day of February, 1889.

GOODALL & CAMPBELL. [Seal.]

By M. C. CAMPBELL. [Seal.]”

At the May term, 1894, of said court, M. C. Campbell entered his motion, supported by affidavit, to set aside the confessed judgment and for leave to plead to the declaration on the merits. Several reasons in support of the motion were assigned, but the principal ground relied on, was that said note is usurious. The court overruled the motion and ordered that the judgment and execution be stayed; that defendant be permitted to plead to the declaration, but that said judgment remain in full force as to the lien thereof, to the end of securing the plaintiff in whatever sum may be found due him from defendant. Thereupon defendant pleaded the general issue, and a special plea as to all but five hundred dollars of the note sued on, setting up substantially that the whole amount of said note for \$1,374.99, above the sum of \$500, is usurious interest. On the issues prescribed by the pleas, the cause was tried by the court, by agreement, and a finding and judgment for plaintiff resulted, for \$500 damages and costs of suit, to reverse which judgment plaintiff took this appeal.

WM. W. CLEMENS, attorney for appellant.

DUNCAN, RHEA & STEPHENS, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

In support of the motion for a new trial, three causes only were assigned, viz.: “1st. The finding is contrary to the law and the evidence in the case. 2d. The court erred in admitting improper evidence on behalf of defendant, against the protest and objection of the plaintiff and in setting aside the confessed judgment. 3d. The court erred in refusing proper evidence offered on behalf of plaintiff.”

A court of law has power to order the opening of a judg-

ment rendered upon a cognovit, where usury is alleged to constitute a part of the judgment, and hear the parties and reduce the judgment, or set the judgment aside. Fleming v. Jencks, 22 Ill. 475.

Where a judgment by confession under a warrant of attorney is opened, and the defendant allowed to plead a defense, the court has no right to require as a condition precedent that the defendant bring into court the money supposed to be due, but the judgment may be allowed to stand as a security for the creditor until after the trial of the issues tendered by defense. In this case, the motion to set aside the confessed judgment was supported by the same reasons urged in support of the motion in the case at bar. Page v. Wallace, 87 Ill. 84.

In Heir v. Kaufman, 134 Ill. p. 226, it is said: "We have held in a number of cases that a court of law exercises an equitable jurisdiction over a judgment by confession. The debtor may move to set aside the judgment before the court of law which rendered it, and present his defense to the claim, if he has any, but the creditor will be protected by permitting the judgment to stand as security. Enforcement of plaintiff's lien is suspended; the judgment is merely stayed. If the defense is successful the judgment fails. The action of the trial court in permitting the defendant to plead his defense, and in staying the confessed judgment, for the reasons set up in support of the motion, is sustained by the authorities cited and was not erroneous. It was not error to admit the parol evidence objected to by plaintiff to show the usury. Verbal testimony is admissible to establish the fact of usurious contract. McGill v. Ware, 4th Scam. 21. If a usurious contract is made, whether express or implied, at the time or subsequent to the entering into the agreement, to take and receive more than the lawful interest, it is such an agreement as is within the purview of the statute. Peddicord v. Connard, 85 Ill. 104. If parol evidence was not admissible to uncover and disclose the real usurious contract, where one existed, the salutary purpose of the law forbidding usury could be defeated by

entering into a written contract reserving only legal interest, but at the same time agreeing verbally to pay usurious interest and carrying out and executing the verbal contract.

The next material question is, was the usury proved as averred in the special plea, and if so, was the amount of damages allowed the full amount plaintiff was entitled to recover under the evidence? The original transaction between the firm of Richart & Campbell, of whose estate appellant became assignee, and the firm of Goodall & Campbell, of which firm appellee was a member, was a loan by the first named firm to the last named, on February 22, 1876, of \$1,000, and \$500 of this amount was paid the next day, and the contract was verbally made to pay twelve per cent interest on the loan, and the same usurious contract existed during all the time up to and at the time the judgment was confessed. Between the time of the payment of said \$500 and March 1, 1879, the usurious interest amounted to \$185, of which sum \$105 was paid, and on March 5, 1879, the borrowers gave a renewal note for \$580, which included the balance of usurious interest unpaid. The loan was continued without other renewal by note until the note sued on was executed, and that note was made up of the note for \$580 and usurious interest thereon at twelve per cent, and another debt of \$105. On March 1, 1879, deducting \$500 principal and \$105 usurious interest paid, from the \$1,000 loaned, which under the law were proper deductions, \$395 was the amount then due, and adding to it the principal of \$105 debt included in the sum of the note sued on, and deducting all the usurious interest, there would remain due plaintiff \$500, as found by the court. The rule that usurious interest once paid, voluntarily, can not be recovered back, does not apply where the transaction has not been settled and closed, and the lender brings suit to recover an alleged balance. In such case the borrower may defend by claiming a credit for whatever usurious interest he has paid in the same transaction. The fact that new notes have been given from time to time, does not change the case. *Saylor v. Daniels*, 37 Ill. 331; *Harris v. Bressler*, 119 Ill. 467, overruling *First Nat. Bank*, 108 Ill. 633.

Hoffman v. Wetzel.

The effect of contracting for or reserving usurious interest, whether by verbal or written contract, is the forfeiture of all interest. This statutory provision applies in this case. See also, *Harris v. Bressler, supra*. The error assigned, that the court did not allow any sum for attorney's fee, we can not consider. This was not one of the specific reasons filed in support of the motion for a new trial. Where certain points in writing are filed, particularly specifying the grounds relied on for a new trial, appellant is confined to those reasons and waives all causes for a new trial not so set forth in the court of review. *O. O. & F. R. V. R. R. Co. v. McMath*, 91 Ill. 111, 112; *Con. Coal Co. v. Schaefer*, 31 Ill. App. 368.

Perceiving no reversible error in the record, the judgment is affirmed.

Athanas Hoffman v. G. E. Wetzel.

1. VERDICT—*When Not to be Disturbed*.—A verdict will not be set aside unless it is manifestly against the weight of the evidence.

Assumpsit, for goods sold and delivered. Appeal from the Circuit Court of Madison County: the Hon. GEORGE W. WALL, Judge, presiding. Submitted at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

CYRUS L. COOK and E. BREESE GLASS, attorneys for appellant.

TRAVOCS & WARNOCK, attorneys for appellee.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee to recover from appellant a balance of \$92.25, alleged to be due for goods sold and delivered. Appellee recovered a judgment for the full amount claimed and appellant brings the case to this court

by appeal, alleging in his brief, as the only ground for reversal, that the verdict is not warranted by the evidence.

To justify interference by this court on this ground, the verdict must be manifestly against the weight of the evidence. But a careful reading of the record impresses us with the belief that the verdict is justified by the evidence. True, the controversy must be decided upon the testimony of the two parties as to the main facts of the case; but appellant's manner of testifying, which is sometimes evasive, and sometimes impudent, discredits his testimony sufficiently to justify the jury in finding against him. A witness who refuses to answer proper questions, propounded not only by his opponent's attorney, but also by the court, can not complain if his stubbornness should be regarded as impeaching his truthfulness.

There is no error in the record, and the judgment is therefore affirmed.

58	194
83	124

58	194
99	*812

Aaron Mayer v. Mattie S. Lawrence.

1. PRACTICE—*Motion in Arrest after Demurrer, etc.*—After a judgment on demurrer there can be no motion in arrest for any exception which might have been taken on the demurrer.

2. PLEADING—*Misjoinder of Counts.*—Where counts in assumpsit and debt were joined in the same declaration, to which the defendant pleaded after his demurrer was overruled, it was held on appeal that the misjoinder was not a sufficient cause for reversal.

3. RENT—*Action for—Averments and Proof.*—In an action for rent it is not necessary to aver or prove that the lessee personally entered upon or used and occupied the premises before he can recover under the lease.

4. PRACTICE—*Erroneous Ruling on a Demurrer, When Not Reversible Error.*—A defendant will not be permitted to complain of the sustaining of a demurrer to his plea when he has had the advantage of the same defense under other pleas.

5. APPELLATE COURT PRACTICE—*Instructions Not Contained in the Abstract.*—The Appellate Court will not consider the instructions where those given by a complaining party are not contained in his abstract.

6. CUSTOM—*When it Does Not Prevail.*—A custom can not be permitted to prevail against the unqualified and unequivocal terms of a written contract.

Mayer v. Lawrence.

Debt, for rent. Appeal from the County Court of Gallatin County; the Hon. D. M. KINSALL, Judge, presiding. Submitted at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

JESSE E. BARTLEY and MCKERNON & MILLSPAUGH, attorneys for appellant.

CARL ROEDEL, attorney for appellee.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

This was an action of debt, in which the pleader inadvertently used the word promise instead of agree, in the second count of the declaration, which is a common count and not a special count. Hence, it is insisted that the trial court erred in not sustaining the motion in arrest of judgment on the ground of a misjoinder of counts in the declaration, the first count being in debt and the second in assumpsit.

A general demurrer was filed to the declaration and overruled, whereupon the appellant pleaded in bar to the whole declaration. The parties concede that appellant afterward sought to raise the question of misjoinder by motion in arrest of judgment. The case will be considered on this supposition, although the bill of exceptions does not fully sustain the concession. The fact is immaterial, for "it is a well settled principle that, after a judgment on demurrer, there can be no motion in arrest for any exceptions which might have been taken on arguing the demurrer." *American Express Co. v. Pinckney*, 29 Ill. 392; *I. O. M. A. v. Paine*, 122 Id. 625; *C. & E. I. R. R. Co. v. Hines*, 132 Id. 161.

In cases where a contrary practice seems to have prevailed, it will be found that no demurrer was interposed to the declaration, as in *Cruikshank v. Brown et al.*, 5 Gilm. 75 and *McGinnity v. Laguerenne et al.*, Id. 101, or, what is practically the same thing, that the demurrer was stricken from the files on plaintiff's motion, as in *Guinnip v. Carter*, 58 Id. 296. In *Adams v. Hardin*, 19 Ill. 273, no demurrer was filed to the declaration, and the question was whether a demurrer to the plea should be carried back and sustained to the dec-

laration. In so far as a different doctrine is announced in *Stears v. Cope*, 109 Ill. 340, this case is overruled by the *Hines* case above cited.

Under these authorities the court did not err in overruling the motion in arrest of judgment. This being true, the question arises, should this court reverse the judgment on appeal on the ground of a misjoinder of counts, when it was not error in the trial court to overrule the motion in arrest of judgment, and when appellant did not stand by the demurrer to his declaration, and thus save the point for presentation in this court? Such a misjoinder of counts as appears in the record before us is a technical objection at best, absolutely without real merit, and should not be considered as ground for reversal in the absence of clear authority requiring such action. In the cases in 5 *Gilman*, where the judgment was reversed for a misjoinder of counts, this action was taken reluctantly and apologetically by the court. We think the rule announced by the Supreme Court should not be extended beyond the strict letter of the decisions. It is true that this court has a right to determine on error or appeal whether or not the declaration is sufficient in substance to sustain the judgment, and this under the authority of the *Hines* case and without regard to the action of the trial court on demurrer to the declaration or motion in arrest of judgment. But we think that the misjoinder of counts under such a state of facts as is disclosed by this record, is not such a substantial defect of the declaration as requires this court to reverse the judgment when there is no available exception to any ruling of the trial court upon the subject.

The next point presented is that the declaration, although averring that appellee leased certain premises to appellant for one year, in consideration of which leasing appellant agreed to pay appellee \$450 for the rent of said premises at the expiration of the term, nevertheless fails to aver an entry on the premises, or the use and occupation thereof by appellant. It is admitted in appellant's argument that if the words, "for the rent of said premises," did not occur in the

declaration, and the averment was simply that appellant agreed to pay in consideration of the leasing, the count would be sufficient.

Our attention has been directed to no authority sustaining this distinction. It is a distinction without a difference. The fact is, as shown by the evidence, that appellant rented the premises for the use of Lamison, who did enter upon and use and occupy the premises during the term. Surely appellee was not required to allege or prove that the lessee named in the lease personally entered upon or used and occupied the premises before he could recover under the lease. 1 Chitty on Pleadings, marginal page 368, and 2d Id., marginal page 551, note y.

It is also urged that the court erred in sustaining the demurrer to the amended fourth plea. This plea alleged in substance that the premises were leased by parol for one year by appellee to Lamison, who took possession thereof and used and occupied the same during the term; that at the time of the leasing, for the purpose of defrauding Lamison's creditors, it was agreed by appellee and Lamison that the lease should be made to appellant; and that the lease to appellant was made in pursuance of this agreement and was without consideration. If the plea had alleged that the agreement with reference to defrauding Lamison's creditors was made by the three—that is, by appellant, appellee and Lamison, the defense thus presented would have been contained in substance in the other pleas on which issues were joined, and the ruling of the court in sustaining the demurrer to the fourth plea, would not be reversible error. *Warner v. Crane*, 20 Ill. 148; *Stevenson v. Sherwood*, 22 Ill. 238; *Mann et al. v. Oberne et al.*, 15 Bradw. 35.

But the plea does in effect aver that appellant was a party to this fraudulent agreement. The facts set forth in the plea can not be true and appellant be innocent of complicity with Lamison and appellee in the fraud. In disposing of the point under consideration, appellant should be held to have averred what he has averred in effect, and by necessary inference, and should not be permitted to complain of the ruling of the court in sustaining the demurrer to his

fourth plea when he has had the benefit of the defense under other issues joined in the case.

It is said that the court erred in giving, refusing and modifying instructions. The abstract contains the instructions given for appellee, but does not contain the instructions given for appellant, which occupy six or seven pages of the record. If there were any inaccuracies in the instructions given for appellee, the error may have been cured by instructions given for appellant. The substance of appellant's refused instructions may be found in those given for him. We decline, in this case, as we have done in other cases heretofore, to consider the instructions where those given for the complaining party are not contained in the abstract. We hold, also, that the trial court properly refused to permit appellant to show that, in times of overflow of lands in the vicinity of these premises, it was customary to take one-third of the crop as rent in lieu of the stipulated rent. The offer of this evidence was not broad enough to establish the requisites of a custom. Besides, the custom, if proved, could not be permitted to prevail against the unqualified and unequivocal terms of the lease sued upon in this case.

It may be remarked, in conclusion, that the evidence, though conflicting, unquestionably justifies the verdict.

The judgment is affirmed.

58	198
150	162
58	198
71	503

Carrie E. Way and William T. Way v. Anna M. Roth and Jennie M. Conklin.

1. **MORTGAGED PREMISES—Sale of, Subject to the Mortgage—Grantee's Liability.**—The conveyance of land upon which there is a mortgage, though made by warranty deed and subject to the mortgage, does not necessarily make the purchaser of the land liable to the mortgagee for the mortgage debt. To create such a liability there must be an express promise, or the amount of the mortgage must have been deducted from the purchase price of the land so as to raise an implied promise to pay. Where this has been done, the mortgagee may hold the grantee to a personal liability.

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2. *SAME—Agreement to Assume Mortgage—Buildings Erected upon Other Premises by Mistake Held Subject to the Lien.*—The owner of two lots erected a house, as he supposed upon them, but by an error in measurement it was, in fact, upon adjoining lots. Without discovering his error he mortgaged his lots and then sold them, the grantee agreeing to pay the mortgage as a part of the purchase money. Upon discovering the error, the grantee bought the lots upon which the house was, for what they were worth as vacant lots. Upon a bill filed to subject the house to the lien of the mortgage, it was held that as the grantee of the lots bought them with a full knowledge of all the facts, and so obtained the house which should have been covered by the mortgage, he had put himself in a position to pay the mortgage according to the contract made by him when he received the deed of the lots upon which the house was intended to be, and must be held to a personal liability.

3. *CHANCERY PRACTICE—Specific Relief Under a General Prayer.*—Where the relief granted is not the specific relief prayed for, if it is within the scope of the general prayer, it will be sufficient if in line with the allegations of the bill.

Bill for Relief.—In equity. Appeal from a decree of the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1894. Affirmed. Opinion filed March 23, 1895.

APPELLANTS' BRIEF, J. W. BARTHOLOMEW AND B. H. CANBY,
ATTORNEYS.

The court can not, under color of reformation, make a contract for parties to which both never assented or intended to make. Jones on Mortg., Vol. 1, Sec. 97.

Rectification can only be had where both parties have executed an instrument under a common mistake, and have done what neither of them intended. A mistake on one side may be ground for rescinding, but not for correcting or rectifying an agreement. Kerr on Fraud and Mistake, Sec. 422; Sutherland v. Sutherland, 69 Ill. 488; Schwass v. Hershey, 125 Ill. 653; Wilson v. Byers, 77 Ill. 76; Broadwell et al. v. Broadwell, 1 Gilm. 607.

A mutual mistake in regard to the title to property is a ground for rescinding a contract. Haddock v. Williams, 10 Vt. 570; Smith v. Robertson, 23 Ala. 312; Brown v. Lamphear, 35 Vt. 252.

DILL & SCHAEFER and GEORGE C. REBHAN, attorneys for appellees.

MR. PRESIDING JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

There were four lots in Alta Sita, each of twenty-five feet frontage, and numbered, respectively, 30, 31, 32 and 33, in block 13. In the spring of 1892, Mrs. Clara A. Brooks was the owner of lots 30 and 31, and John A. Perry was the owner of lots 32 and 33.

Mrs. Brooks' husband, as her agent, began the erection of a two-story building on her lots, as he supposed. He completed the foundation and erected certain out-buildings. By mistake, however, these improvements were made on lots 32 and 33 instead of lots 30 and 31.

Mrs. Brooks, without proceeding further with the erection of the house, sold her lots to Thomas B. Glenn. On October 8, 1892, Glenn borrowed \$1,400 of Anna M. Roth, one of appellees, and executed and delivered to her a note for the amount so borrowed and a mortgage on lots 30 and 31, to secure the payment of the note. At least \$950 of the borrowed money was used in the erection of the house on lots 32 and 33. On December 29, 1892, Glenn, who was an unmarried man, conveyed lots 30 and 31, by general warranty deed to Mrs. Jennie M. Conklin, for the consideration of \$3,500, subject to the said mortgage for \$1,400.

On June 20, 1893, Mrs. Conklin and her husband conveyed lots 30 and 31, by general warranty deed, to the appellant, Carrie E. Way, for the consideration of \$2,400, subject to the said mortgage for \$1,400.

The consideration of \$3,500 in the conveyance from Glenn to Mrs. Conklin was paid by an exchange of property. The price of each piece of property was exaggerated, after the manner of such transactions, but the deed was made subject to the mortgage as above stated, and the amount of the mortgage was actually deducted from the consideration named in the deed—that is to say, the property deeded by Glenn, without the mortgage, was estimated to be worth \$1,400 more than that deeded to him.

The consideration of \$2,400 in the conveyance from Mrs. Conklin to Mrs. Way was paid as follows: The mortgage

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of \$1,400 was deducted from the consideration, the sum of \$550 was paid in cash, and a note for \$450 was given for the remainder. In the abstract prepared by Mrs. Way's counsel, she is made to testify as follows: "The exact amount I was to pay was a \$1,400 mortgage, \$550 in cash, and I gave a mortgage for \$450." The evidence shows quite clearly that Mrs. Way assumed and was to pay the mortgage for \$1,400.

Until the early part of August, 1893, all of the parties to said transactions and conveyances supposed that the house and out-buildings were on lots 30 and 31, but the fact was, as has been stated, that these improvements were on lots 32 and 33, which were owned by John A. Perry.

In making measurements for the erection of a fence, the mistake was discovered. As soon as Mrs. Way learned of the mistake, she made a parol contract with Perry's agent for the purchase of lots 32 and 33 for \$400, the estimated value thereof as vacant property, and paid a small part of the purchase price.

As soon as Mrs. Roth's agent learned of the mistake, he sought to protect his principal by purchasing lots 32 and 33 for her; but Mrs. Way completed her contract, received a deed for the two lots, paid \$100 in cash, and gave two notes, secured by a mortgage on the lots, for the remainder of the purchase money. Mrs. Way bought with the full knowledge of the facts above stated. She was aware of Mrs. Roth's desire to purchase the two lots.

During the time of these transactions, lots 30 and 31 were not worth more than \$400. The buildings erected on lots 32 and 33 were worth at least \$2,000.

Mrs. Roth filed her bill in chancery, setting forth, as the same was afterward amended, the foregoing facts, and praying that her mortgage be corrected so as to include therein lots 32 and 33; that said mortgage be declared a first lien on all of the four lots; that defendants, Mrs. Way and her husband, and Mrs. Conklin, be required to pay the amount due; and that in default thereof the lots be sold for the satisfaction of the mortgage.

The bill concluded with a general prayer for relief.

The answer of Mrs. Conklin to the bill admitted the allegations thereof to be substantially true. The answers of Mrs. Way and her husband admitted some of the allegations and denied others, and denied especially that the complainant was entitled to relief in any event.

Mrs. Way and her husband filed a cross-bill against Mrs. Roth and Mrs. Conklin, praying for a rescission of the contract between Mrs. Conklin and Mrs. Way, whereby the latter had purchased lots 30 and 31, and for a cancellation of the note for \$450, and also for the re-payment of the \$550 paid Mrs. Conklin in cash for those lots.

The defendants to the cross-bill answered the same by denying the right to the relief prayed for.

Replications were duly filed and the cause was heard by the court upon depositions, documentary evidence and the testimony of witnesses examined in open court.

The decree rendered by the chancellor finds the facts substantially as stated in the original bill; that Mrs. Way is personally liable for the amount due Mrs. Roth under the note and mortgage for \$1,400; that the mortgage should be foreclosed on lots 30 and 31; and that a personal decree should be rendered against Mrs. Way for the deficiency. The decree follows these findings, forecloses the mortgage, holds Mrs. Way for the deficiency, and dismisses the cross-bill.

On the part of appellants, it is assigned for error that the court erred in dismissing the cross-bill and in rendering a personal decree against Mrs. Way.

On the part of Mrs. Roth, it is assigned as a cross-error, that the court erred in refusing to declare a lien in her favor on lots 32 and 33.

It seems to be the well-settled law of this State that the conveyance of land by A, on which C holds a mortgage, to B, though made by warranty deed, and subject to the mortgage, does not necessarily render B liable to C for the mortgage debt. To create such a liability there must be an express promise, or the amount of the mortgage must have been deducted from the purchase price of the land so as to

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raise an implied promise to pay. Where this has been done, the mortgagee may hold the grantee to a personal liability in an appropriate action. *Comstock v. Hitt*, 37 Ill. 542; *Fowler v. Fay et al.*, 62 Ill. 375; *Rapp v. Stoner et al.*, 104 Ill. 618; *Dean v. Walker*, 107 Ill. 540.

In the case under consideration, not only was the warranty deed to Mrs. Way made subject to the mortgage, but the amount of the mortgage was deducted from the purchase price and Mrs. Way was to pay this mortgage as the balance of the purchase money. Thus Mrs. Way would have become personally liable, under ordinary circumstances, to Mrs. Roth, for the amount of the mortgage.

But it is said that Mrs. Way agreed to pay \$2,400 for lots 30 and 31, believing that the buildings were upon them, and was a loser herself by the transaction; and that Mrs. Way, an innocent sufferer, should not be required to make good the loss of another sufferer, whose equities are no stronger than hers.

But even if this were true, it must be remembered that Mrs. Way, to make herself whole, bought lots 32 and 33 for what they would have been worth as unimproved lots, and thus obtained the buildings which should have been covered by Mrs. Roth's mortgage. This was done by Mrs. Way with full knowledge of all the facts. She has thus put herself into a position to pay Mrs. Roth's mortgage according to the contract made by her when she received the deed from Mrs. Conklin, and must be held to have reaffirmed that arrangement and to have prepared for a renewed personal liability.

Especially is this true when Mrs. Roth desired to buy lots 32 and 33 for her protection, which would have operated to release Mrs. Way from personal liability, and the latter, in preference to being released, elected to purchase the lots for herself. To hold that Mrs. Way can now escape a personal liability would be to allow the perpetration of a fraud. *Wilson v. Byers et al.*, 77 Ill. 76.

Perhaps the chancellor could have decreed a lien upon lots 32 and 33, as is insisted by Mrs. Roth; but this is some-

what doubtful, and the relief granted is not doubtful, and is adequate under the circumstances, as Mrs. Roth's counsel admit.

While the relief granted is not the specific relief prayed for, yet it is within the scope of the general prayer. Part of the specific prayer is that appellants be required to pay the amount due. But if this language does not authorize the relief granted, the general prayer, in view of the allegations of the bill, is certainly sufficient for that purpose.

There was no equity in the cross-bill and the same was properly dismissed.

The decree of the Circuit Court is affirmed.

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58	212
58	218

Pioneer Savings and Loan Company v. Michael S. Brockett.

1. **CORPORATIONS—Exercise of Conferred Powers Binding upon Stockholders.**—The exercise of a power expressly conferred upon a corporation by its by-laws, can not be questioned by the stockholders.

2. **BY-LAWS—A Part of the Stockholder's Contract.**—Where it is stipulated by the certificate of stock that the by-laws of the association shall be a part of the contract between the association and the stockholder the latter will be bound by the by-laws and will not be permitted to question legitimate exercise of a power conferred thereby upon the association.

3. **SAVINGS AND LOAN ASSOCIATIONS—Payments upon Stock, Not upon Indebtedness.**—When a stockholder in a savings and loan association is also a borrower from said association, payments of dues upon his stock are not payments upon indebtedness, and do not of themselves work an extinguishment of such indebtedness.

Foreclosure Proceedings.—In the Circuit Court of White County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Appeal by defendant. Heard in this court at the August term, 1894. Reversed and remanded. Opinion filed March 23, 1895.

**APPELLANT'S BRIEF, CALHOUN, STEELY & JONES, ATTORNEYS;
GEORGE D. EMERY, OF COUNSEL.**

A stockholder in a building association sustains a dual relation to the corporation:

1. He is a debtor to the extent of the unpaid balance of his stock, and also of any loan made by him. Mich., etc.,

Ass'n v. McDevitt, 77 Mich. 1; Thompson on B. A., p. 23, Sec. 3; p. 85, Sec. 37.

2. He is a creditor to the amount of his stock payments, with accrued profits, if any. 2 Am. and Eng. Ency. of Law, p. 610; Thompson on B. A., p. 22, Sec. 3; p. 59, Sec. 1.

Such corporations occupy a place between a private corporation and a partnership, and no other corporations are given such powers, and no other stockholders have such rights. Thompson on B. A., p. 23, Sec. 3.

Payments on his stock are not *ipso facto* payments on his loan. In Thompson on B. A., p. 85, Sec. 39, it is said: "The borrower's liability on his stock and his liability on his loan being different, payments on his stock are not *ipso facto* payments on the mortgage debt or loan. The law holds the distinction, and requires appropriation by the association or application by the member to effectuate that purpose. A member may, then, at any time apply his stock payments as a credit on his debt by paying in cash the balance, if any. And the credit is the withdrawal value of the share (Watkins v. B. A., 97 Pa. St. 514), to be ascertained by the charter and by-laws without regard to the improper withdrawal of shares by other stockholders." Building Ass'n v. Gallagher, 3 Law Times, N. S., 101.

The "value," it is held, is to be ascertained by the number of stock payments, excluding interest or profit, and less expenses. B. A. v. Groesbeck, 41 L. J. 16; Mechanics' Ass'n v. Conover, 1 McCart. 219; Watkins v. Ass'n, 10 W. N. C. 414.

He may pay off the loan and retain his stock. Springville Ass'n v. Raber, 33 Leg. Int. Pa. 329.

As to the rules for computing amount due upon foreclosure, see Thompson on B. A., p. 93, Sec. 47, and p. 96, Sec. 51; Endlich on B. A., Secs. 154-164. The association holds a lien on the stock of a member for the payment of fines, and he can not apply his stock in cancellation of his debt until that lien is satisfied. Thompson on B. A., p. 101, Sec. 5.

The measure of the stockholder's liability is the amount of his stock subscription (State, etc., Ass'n v. Kellogg, 63 Mo. 540) and fines imposed for failure to make payments

when due. *Union B. A. v. Masonic Hall Ass'n*, 29 N. J. Eq. 389; *Parker v. Butcher*, L. R., 3 Eq. 762.

The stock contract and the mortgage or loan are separate and distinct contracts, and a payment upon the one is not a payment upon the other. *Southern B. and L. Ass'n v. The Anniston Loan and Trust Co. (Ala.)*, 15 So. Rep. 123; *North A. B. Ass'n v. Sutton*, 35 Penn. St. 463; *Endlich on B. Ass'ns*, Sec. 452; *Washington B. and L. Ass'n v. Hornbacker*, 42 N. J. L. 635; *Robertson v. Homestead Ass'n*, 69 Am. Dec. 163, and *Freeman's notes thereto*; *Thompson on B. Ass'ns*, p. 65, Sec. 39.

ORGAN & ORGAN and M. H. MUNDY, attorneys for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

On February 1, 1887, the appellee subscribed for and obtained ten shares of stock in the National Building, Loan and Protective Union, which name was changed to that of appellant, of \$100 each, as evidenced by stock certificate No. 3872, on which stock he borrowed \$1,000, May 2, 1887, giving his note therefor, secured by a mortgage on 80 acres of land, due and payable five years after date, with interest at five per cent per annum and five cent premium per annum thereon, payable monthly, on or before the last Saturday in each month.

The appellee paid sixty monthly installments of 60 cents each on his stock	\$360 00
He also paid forty-two protective, or withdrawal installments, of 25 cents each . .	105 00
And a cancellation fee of \$3 per share in advance	30 00
Total paid on stock	\$495 00
He also paid in all, interest on the note at five per cent	\$238 00
And the same amount of premium on the loan	238 00
Total amount paid on stock and loan	\$971 00

The note and mortgage became due February 1, 1892. On the 13th day of June, 1893, appellee filed his bill to cancel said mortgage, on the ground the debt had been fully discharged by the foregoing payments.

The appellant answered the bill and filed a cross-bill to foreclose the mortgage, alleging the debt was not paid, on which issue was joined.

The appellee's case is based upon the certificate of stock issued to him, the material portion of which is as follows: "This certifies that Michael S. Brackett * * * is hereby constituted a shareholder of the National Building, Loan and Protective Union, incorporated under the laws of the State of Minnesota, and holds ten shares therein of \$100 each, and in consideration of the admission fee * * * and full compliance with the terms, conditions and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract, the said Union agrees to pay said shareholder * * * the sum of \$100 for each of said shares at the end of five years from the date hereof, payable in the manner and upon the conditions set forth in said terms, conditions and by-laws hereto attached. And the Union further agrees to pay said shareholder * * * upon the terms and conditions above named, at the maturity of this certificate, whether by death or at the expiration of five years, a further sum not to exceed the amount of all protective payments made upon this certificate. * * * This certificate of shares is issued to and accepted by the holder, upon the following express terms and conditions: First, the shareholder * * * agrees to pay * * * a monthly installment of sixty cents on each share named in this contract, the same to be paid on or before the last Saturday of each month during the continuance of this contract, and the further sum of twenty-five cents on each share as a protective payment to be paid on or before thirty days from the date of the notice of the same.

There are seventeen conditions in all. The fourth provides for a forfeiture on failure to make such payments, and for the imposition of a fine; the thirteenth for a cancellation

fee of \$3 per share; the sixteenth that five per cent of all installments and payments may be used to defray expenses; the eleventh provides that the by-laws which are attached * * * shall be part and parcel of this contract and * * * shall be construed together." Article 14 of the by-laws provides that each certificate shall be charged with any and all amounts that may be owing from the shareholder, whether dues, assessments, loans, interest or premium, and at the time of paying the certificate, the association reserves a lien thereon to secure the payment of such indebtedness, and the right to deduct and withhold such account or indebtedness in payment thereon.

Article 15 provides that each shareholder shall pay a protective payment on each share of stock, of twenty-five cents, within thirty days after notice, for the purpose of paying shares of stock matured by the death of any shareholder, or when deemed necessary by the board of managers, forty per cent of which shall be used for that purpose, forty per cent shall be placed in the return protective payment fund, "and an amount equal to the same at the date of maturity shall be accepted by the shareholder as full payment as return protective payment;" the remaining twenty per cent shall be placed in the reserve or contingent fund.

Article 22 provides that the association reserves the right to divide its shareholders into classes for the purpose of assessment at any time it may choose to do so, and further reserves the right, * * * when it is deemed necessary by the board of managers, to protect the association, to require such payments as may be necessary to pay off or cancel shares, * * * such canceling payments not to exceed twenty-five cents on each share included in any certificate for every share maturing by time in any one month.

On April 28, 1891, the board of directors and the executive committee framed a resolution classifying certain stock in series "A" and providing that all shares included in certificates numbered from 3,300 to 5,018, inclusive, should each be assessed or required to pay, as protective payments, in addition to those already paid, such a number of payments as

will make in all, 100 protective payments per share. The resolution recited that it was deemed necessary. The secretary, under the resolution, was directed to issue the notices and make the call for payments on the shareholders. The appellee was duly notified to make payments in the sum of \$170 on his ten shares, for the purpose of maturing said stock. This he refused to do, although his stock certificate was included in said classification, and came within the numbers named in the resolution. He evidently relied on the contract on the face of his certificate, without taking into consideration the provision that the \$100 per share was to be paid to him in five years "in the manner and upon the conditions set forth in the terms, conditions and by-laws attached." Those terms, conditions and by-laws, as heretofore shown, required him, first, to pay sixty cents per month on each share of stock; second, twenty-five cents per share as protective payments, within thirty days after notice; third, such payments as the appellant might deem necessary to pay off and cancel shares. This third requirement, as will be found by an examination of article 22, is only limited, as to the amount required to be paid, by the number of shares included in such classification as therein authorized, "maturing by time in any one month." The exercise of the power by that article vested can not be questioned by the appellee, if the action taken is within its terms. The action was clearly taken to protect the association against loss, under a power expressly conferred.

There is no requirement on the part of the association to return any of the money so received, as there is for money paid as protective payments, under article 15. The power is given and the money is paid thereunder for the purpose of maturing the stock within the time agreed in the certificates.

Had appellee read his entire contract, he would have observed it. As shown by his letters, he supposed that by the payment of the sixty cent monthly installments, the interest and premium at five per cent each for five years on \$1,000, the stock would be matured and his debt discharged.

Had he exercised his every-day judgment he would have known such payments could not mature the stock in that time, and that no company could do business on such a basis. He also assumed that the protective payments made by him, as shown by his letters, were to be fully returned to him. Had he read his contract, he would have found the agreement was that he was to receive, at the expiration of five years, "not to exceed the amount of all protective payments," and by reading article 15 of the by-laws printed on his certificate, would have found that, in no event, was he to have returned to him more than forty per cent of such protective payments, with possibly its accumulations, if any, and that he had distinctly so agreed.

The evidence is undisputed that appellee was notified to pay ninety-one protective payments, so-called, on account of stock maturing by the death of shareholders, as provided by article 15 of the by-laws, which, at twenty-five cents per share, would in the aggregate amount to \$227.50. He only made forty-two such payments, amounting to \$105. He was required to make certain payments on his certified stock, No. 3,872, which was in series "A," in order to mature the stock certificates therein from 3,300 to 5,028, which he refused to do. The amount due under this call was \$145, at the lowest estimate.

Fines to the amount of \$68 for failure to make protective payments, as provided by the fourth condition of his certificate, were assessed against him. He agreed that five per cent of all payments might be used to defray expenses, which amounted to \$31.68, as taxed by the association. Ignoring the protective payments, which he failed to make, there was otherwise due from appellee \$244.37, which, by article 24 of the by-laws, are made a lien on his stock, with the right given to deduct the same from the indebtedness, as represented by his certificate, which matured February 1, 1892, according to its face terms.

The evidence shows the accumulated profits had made his stock worth at that time \$1,000, less said \$244.37, or \$755.63, on which he had only paid \$495. The payments of interest

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and premium on the loan were made under an entirely distinct contract. They were made for the use of the money loaned, and not as payment on stock. As is said by Endlich on the Law of Building Associations, Sec. 452, "It has become a well recognized doctrine that payments of dues upon stock are not payments to the mortgage debt, and do not, *ipso facto*, work an extinguishment of so much of the mortgage."

By the payment, then, of \$244.37, his stock would have matured February 1, 1892, and been released of all liens thereon, and he would have been entitled to a release of his mortgage.

It is suggested in the argument of appellee that appellant had no legal right to do business in this State and make the loan. The statute, as well as decisions construing the same, declare such right. The decree on the original bill is set aside, with directions to dismiss the bill, and the decree on the cross-bill is reversed and cause remanded.

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1. SAVINGS AND LOAN ASSOCIATIONS—*Power of Making Assessments.*
—When the by-laws of an association are expressly made a part of the contract or certificate of stock, and expressly give the association power to make sufficient assessments, so that stock will mature within a fixed time, the stockholder can not question the action of the association in making such assessments, where no fraud is practiced upon him.

Foreclosure Proceedings.—Appeal from a decree of the Circuit Court of White County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1894. Reversed and remanded. Opinion filed March 23, 1895.

CALHOUN, STEELY & JONES, attorneys for appellant;
GEORGE D. EMERY, of counsel.

ORGAN & ORGAN and M. H. MUNDY, attorneys for appellees.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This case involves the same questions as those decided in case of same appellant against Brockett. The same arguments are submitted, as stated by appellee's counsel, "the only contention in the case being as to the power of the officers at Minneapolis to make assessments without any reason being shown or existing therefor." It is admitted by appellee that he did not pay assessments made to mature the stock within the five years.

The by-laws, which are expressly made a part of the contract or certificate of stock, expressly give the power to make sufficient assessments so that the stock included in such classification will mature within the time limited. This was essential to protect the association against loss, which the by-laws gave the officers power to do. How otherwise could the association be expected to pay the full face value of the stock at the expiration of five years, except by maturing the stock in the way of assessments? The shareholders doubtless did not know that such power existed; yet the proposition on the face of the certificate—not considering the terms, conditions and by-laws—was so unreasonable, as a moment's reflection would have disclosed, that the holders should have been put on their guard and looked further into the hidden powers contained in the terms, conditions and by-laws, subject to which the certificates were expressly issued. There is no claim made of fraud practiced upon these shareholders, and in view of the plain provisions printed on the certificates, we do not well see how there could be. The decree on the original bill is set aside, with directions to dismiss the bill, and the decree on the cross-bill is reversed and the cause remanded.

Pioneer Savings and Loan Company v. Frederick Kirk et al.

1. GOVERNED by the Two Preceding Cases.

Memorandum.—In equity. Appeal from the Circuit Court of White County; the Hon. E. D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1894. Reversed, etc.

Wabash R. R. Co. v. Sanders.

CALHOUN, STEELY & JONES, attorneys for appellant;
GEORGE D. EMERY, of counsel.

ORGAN & ORGAN and M. H. MUNDY, attorneys for appellees.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This case involves the same legal questions raised and decided in the two preceding cases. The decree in the original bill is set aside with directions to dismiss the bill, and the decree on the cross-bill is reversed and the cause remanded.

Wabash Railroad Company v. George B. Sanders.

1. **WATERCOURSES—Obstructions by Railroads.**—It is the duty of railroad companies, whose roads lead over natural watercourses, to construct substantial and efficient embankments and culverts, so as to admit of the escape of accumulating waters through them in times of high as well as of low water.

2. **SAME—Insufficient Culverts and Embankments—Railroads—Damages.**—The embankments and culverts of a railroad over a watercourse having been washed away, the company rebuilt the culvert, but in a manner insufficient to carry off the water in the time of a freshet, and constructed its embankment out of coal slack. Another freshet having occurred, the culvert was swept away and the coal slack carried down by the waters and deposited upon the adjacent lands, rendering them unfit for tillage. The railroad company was held liable for the damages.

3. **NUISANCES—Damages from—Notice to Abate.**—Where a railroad company, negligently and in violation of the duty imposed upon it by law, builds an insufficient culvert over a watercourse and constructs its embankment out of improper material liable to be washed out and deposited upon the lands of the adjacent owner, such structures are nuisances and the company will be liable for all injuries resulting therefrom. The person injured has a right to recover his damages without notifying the company to abate such nuisance.

4. **SAME—Notice to Abate—Form.**—No particular form of notice to abate a nuisance is required. In cases where such notice is necessary, it is sufficient if the person continuing the nuisance be so far apprised of the injury done and the claim for redress as not to be taken by surprise.

Trespass on the Case.—Obstructing watercourses, etc. Appeal from the Circuit Court of Madison County; the Hon. GEORGE W. WALL, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Submitted at the August term, 1894. Affirmed. Opinion filed March 28, 1895.

Appellee's second instruction:

The court instructs the jury that although they may believe from the evidence that the road-bed over plaintiff's land was constructed by a company other than the defendant, yet if they further believe from the evidence that after such road came into the possession of the defendant, the culvert and part of the road-bed, as originally built by said other company, was washed out, and that thereafter the defendant rebuilt such culvert and filled in said road-bed, and that in doing so the said culvert and road-bed were so improperly constructed by it that the water was prevented from flowing in its usual course in times of high water, and that thereafter at such times the water was thereby held back until it flowed over said road-bed at the place where it was so constructed by the defendant, and that by reason of such overflowing, coal slack and other similar material used by the defendant in the rebuilding of said road-bed were washed upon the lands of the plaintiff and that his lands or crops were injured thereby, and that such injuries occurred prior to the commencement of this suit, then the jury should find for the plaintiff and assess his damages at whatever sum the evidence may show he has sustained thereby, if any.

APPELLANT'S BRIEF, G. B. BURNETT AND TRAVOUS & WARNOCK, ATTORNEYS.

The liability for obstructions of this kind, if it exists, is a personal one. The erector remains liable notwithstanding the transfer of the land upon which the structure is erected, and this liability is not transferred to his grantee by a conveyance of the land. *Eastman v. Amoskeag Manufacturing Co.*, 44 N. H. 143.

The law is well settled that a purchaser of property upon which a nuisance is erected is not liable for its continuance, unless he has been requested to remove it. The purchaser of property might be subjected to very great injustice if he were made responsible for consequences of which he was ignorant, and for damages which he never intended to occasion. The plaintiff ought not to rest in silence and presently surprise an unsuspecting purchaser by an action for damages, but should be presumed to acquiesce until he re-

quests a removal of the business. *Pillsbury v. Moore*, 44 Me. 154.

APPELLEE'S BRIEF, HADLEY & BURTON, ATTORNEYS.

It is the right of each proprietor of land upon a natural watercourse to insist that the water shall continue to run as it has been accustomed to do and to insist that no one shall obstruct it injuriously to him without being liable in damages. A railroad company in constructing its road over watercourses must make suitable bridges, culverts, or other provisions for carrying off the water effectually. *O. & M. Ry. Co. v. Thillman*, 143 Ill. 133.

Public health and convenience as well as the positive law of the State, alike demand that railways leading over natural streams and drains, should by means of efficient and substantial culverts or otherwise, be so constructed as to admit the escape of accumulating waters through them, in times of high water as well as low. When the company commences operating its road without having built such culverts, or provided some other efficient means of escape for the water, is it thereby relieved of the duty of doing so altogether? To say this, is to assert that one may discharge a legal duty by utterly disregarding it, which is simply absurd. To maintain such an embankment is not only a violation of a public duty, but it is a direct invasion of the private rights of the owner of the land thus continually menaced by overflows. *O. & M. Ry. Co. v. Wachter*, 123 Ill. 440.

The duty of constructing and maintaining proper ditches, culverts and sluice-ways, so as to permit the water to pass through, is a continuing duty. Each overflow upon the land of an adjoining owner, caused by the negligence or want of skill of a railroad company in its mode of constructing or maintaining a bridge or embankment over a running watercourse, creates a new cause of action against the company for injury thereby occasioned. *O. & M. v. Thillmann*, 143 Ill. 136; *C., R. I. & P. R. Co. v. Moffitt*, 75 Ill. 524; *C., B. & Q. R. R. Co. v. Schaffer*, 124 Ill. 124; *C. & A. R. R. Co. v. Willi*, 53 Ill. App. 603.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This case is before us and is reported in 47 Ill. App. Rep. 436. It was then averred in the declaration that defendant maintained an insufficient culvert across the arm of a creek, whereby, during a freshet, the coal slack in the railroad embankment on each side of the culvert was carried off and deposited on plaintiff's land, to its great damage. There was no averment as to when, or by what corporation the culvert and embankment were constructed, or that defendant was notified to abate the nuisance. A demurrer was interposed to this declaration in the trial court and was there overruled. The record was brought to this court, and we held that under the rule requiring us to construe the pleading against the pleader, we could not assume that defendant created the nuisance by the construction of the culvert and road in the absence of an averment to that effect, and the court below erred in overruling the demurrer, also holding that the liability of a grantee of land with a nuisance upon it, for maintaining the same, only arises after notice to abate it. The judgment was reversed and the cause remanded to the trial court, where an amended declaration of three counts was filed with proper and sufficient averments to obviate the objections to, and supply the defects in the declaration demurred to. Defendant pleaded the general issue to the amended declaration. The cause was tried by a jury and a verdict returned finding defendant guilty, and assessing plaintiff's damages at \$155. Defendant's motion for a new trial was overruled, and judgment was entered on the verdict for the damages assessed and costs of suit. Defendant took this appeal.

The amended declaration in substance charged :

First. That on August 1, 1889, the defendant wrongfully constructed an embankment, or fill, of coal slack, about three feet high, and put an insufficient culvert or sluiceway thereunder; that by reason of the said embankment and said culvert, the waters that naturally flowed to that place were stopped, and because of the insufficiency of the culvert, the road bed, culvert, etc., were washed off the right of way on the land of appellee, and the crops and land ruined.

Second. That after the road-bed as aforesaid had been washed away, the defendant wrongfully and negligently repaired and rebuilt its road-bed, embankment or fill, with coal slack, and put an insufficient culvert thereunder, and thereby the waters were stopped by said embankment, and accumulated and washed away the coal slack, culvert, etc.

Third. That defendant wrongfully maintained an embankment, road-bed or fill, composed of coal slack, with an insufficient culvert or sluiceway thereunder, after the plaintiff had notified the defendant to remove said embankment and culvert, and to properly construct or repair and maintain the same, and after notice and request to abate said nuisance, floods came, and on account of said embankment and said culvert, the waters accumulated and washed away said coal slack and culvert, to the injury of the plaintiff, etc.

An examination of the record satisfies us the proof sustains the verdict. The evidence shows that after defendant had taken the possession and control of said railroad it constructed a portion of the road-bed of coal slack, and under it placed a culvert insufficient to carry off the water in time of a freshet. That it continued to maintain such portion of its road-bed of that material and the culvert in that condition, and thereby the waters that naturally flowed to that place were obstructed and backed up against said road-bed, and on several occasions thereafter, before this suit was commenced, when there were heavy rains and high water, the road-bed ties and rails were washed off and carried out over plaintiff's land, and after each washout, coal slack in large quantities was again used by defendant in constructing the road-bed anew. The coal slack was carried off and deposited to the depth of several inches upon part of plaintiff's land, by repeated overflows, and rendered that part of the land unfit for tillage, and thereby damaged plaintiff the full amount recovered.

This damage resulted from the negligence of defendant in constructing and maintaining its embankment of material liable to be washed out and deposited on plaintiff's land, and a culvert insufficient and inadequate, in violation of the duty

imposed by law, independent of any statute. For injuries resulting from the nuisance so created and maintained by defendant, plaintiff had the right to recover damages, without notifying defendant to abate the nuisance. But it also appears plaintiff did notify defendant's servant of the injurious consequences resulting from the use of coal slack for its road-bed and demanded that defendant should cease to use it for that purpose, and also informed defendant's servant of the insufficiency of the culvert and the reasons why it was insufficient. No particular form of notice to abate a nuisance is required, even in a case where notice is necessary to the maintenance of a suit; but it is sufficient if the person continuing the nuisance be so far apprised of the injury done, and the claim for redress, as not to be taken by surprise. *Woodam v. Tufts*, 9 N. H. 92, cited in appellant's brief. The second instruction given for plaintiff complained of by appellant's counsel, was right, and the court did not err in giving it.

No error is perceived by us requiring the reversal of the judgment, and it is affirmed.

CASES

IN THE

APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—OCTOBER TERM, 1894.

58	219
98	263
98	599
58	211
98	1 41
58	211
100	86

**Chicago Title & Trust Company, Receiver of the James
H. Walker Company, v. Joseph Caldwell.**

1. **RECEIVERS—When They May Appeal.**—A receiver is the mere hand of the court to do what the court directs. When in passing upon his accounts the court charges, or refuses to allow items, and he claims the action of the court does him wrong personally, he may appeal, but he can not appeal from an order in which he has no interest, as one relating to the distribution of assets.

Bill to Dissolve a Corporation and distribute its assets. Appeal from an order upon the receiver. Entered by the Circuit Court of Cook County; the Hon. SAMUEL P. MCCONNELL, Judge, presiding. Submitted at the October term, 1894. Dismissed. Opinion filed April 4, 1895.

WILLITS, CASE & ODELL, attorneys for appellant.

CHARLES SHACKLEFORD, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
The appellant is receiver of the assets of the James H. Walker Company, a corporation, under a bill filed against it to dissolve it, and distribute the assets. No further statement of the objects of that suit is necessary to the consideration of the question upon which we will dispose of this appeal.

September 7, 1894, the court ordered that a claim made against the Walker Company "be allowed against the estate for \$850, to be paid *pro rata* with the claims of general creditors, and that the receiver pay to said Caldwell, as dividends upon said sum, the same percentage thereof as paid upon other claims of unsecured creditors."

From that order the court allowed an appeal to this court which the appellant perfected, and the case is now here.

Very vague and confused notions seem to prevail in this county—we have not observed that they have spread over the State—as to the powers of receivers. A receiver is the mere hand of the court, to do what the court directs.

When in passing upon his accounts the court charges or refuses to allow items, and he claims that the action of the court does him wrong personally, he may appeal. *Hinckley v. Gilman, etc., R. R.*, 94 U. S. 467; *How v. Jones*, 60 Iowa 70.

But if he may appeal from one order in which he has no interest, as to the distribution of assets, he may from every one; and unless he can be charged with bad faith or want of reasonable prudence, his expenses and reasonable compensation must come out of the assets. No precedent for such an appeal has come to our knowledge except a series of cases in 28 N. Y. Sup., where, under the peculiar system of New York, it was held that a receiver having a right to apply to the court for instructions, was entitled to instruction by the entire court, and therefore, might appeal from special to general term. *People v. St. Nichols Bank.*, 28 N. Y. Sup. 407.

But even there the vigorous protest of Van Brunt, P. J., would seem unanswerable if the appeal were to another court.

This point has not been made by counsel for the appellee, but we can not sanction, even by silence, the idea that a receiver may set up in opposition to the court, his theories of how the assets shall be disposed of.

Next we will have clerks appealing from directions of the courts to enter orders, unwise in the opinion of the clerks.

Schwarze v. Greenbaum.

The appeal is dismissed at the cost of the appellant, to be paid by it, without any charge against the estate for costs or other expenses. Appeal dismissed.

Carl Schwarze v. S. J. Greenbaum.

58	221
80	528
58	221
107	581

1. **VARIANCES**—*Must be Raised in the Court Below.*—The question of a variance between the pleadings and the proofs can not be raised for the first time in the Appellate Court.

2. **PAYMENT**—*An Affirmative Defense.*—Payment is an affirmative defense and the burden of proving it is upon the defendant.

Assumpsit, for money paid out for the appellant at his request. In the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Plea of the general issue with affidavit of merits; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Submitted at the October term, 1894, and affirmed. Opinion filed April 4, 1895.

KRAFT, WILLIAMS & KRAFT, attorneys for appellant.

ADOLPH MOSES, MAX PAM, and JOSEPH W. MOSES, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant for money paid out for the appellant at his request. The testimony by a witness for the appellee was, that at the appellant's request, the witness, April 14, 1893, as agent of the appellee, paid for the appellant to the collector of internal revenue at Lexington, Kentucky, \$583.20 taxes on fifteen barrels of whisky. The bill of particulars filed with the declaration was as follows:

"1893, April 14. By cash paid and advanced to defendant, at instance and request of defendant, and for moneys paid out and advanced by plaintiff to and for use of defendant, \$285.34."

The witness testified that the appellant had paid on account \$297.86.

The first complaint of the appellant is that the evidence is of so much more paid, than is claimed by the bill of particulars. This variance, if it be one, was not made the subject of objection on the trial, and it can not be for the first time objected to in this court.

Now it may be that the testimony as to the payment of this tax, by New York exchange mailed to the collector, without any proof that the draft was ever received by the collector, nor that it was ever paid, was not sufficient to sustain the appellee's claim; but any error in that regard, and all exceptions by the appellant to the character of the evidence, are rendered immaterial by the testimony of the appellant himself that the appellee did pay the tax on the fifteen barrels.

The whole contest was whether the appellant had repaid, and on the evidence, which certainly did not preponderate in favor of the appellant, the jury found against him. The defense was an affirmative one which he failed to prove, and the judgment is affirmed.

William E. Webbe v. Romona Oolitic Stone Company.

1. CONSTRUCTION OF CONTRACTS—*Intention of the Parties—How Arrived at.*—As between the original parties to a transaction, the contract is to be gathered from all that appears upon it; the contract must be collected from the four corners of the document.

2. CONSIDERATION—*Necessary to Support a Contract.*—To every contract there must be a consideration to support it, either expressed in words or implied in the very nature of the contract; otherwise it would be a mere *nudum pactum*.

3. SAME—*Forbearance to Sue.*—A promise to pay the debt of another in consideration of a forbearance to sue for a time certain or for a reasonable time, is a good consideration; but a mere forbearance, without an agreement to forbear, will not render the promisor liable.

4. FORBEARANCE—*As a Consideration.*—Forbearance, to be sufficient as a consideration, must be in pursuance of a mutual agreement, the consideration being a promise for a promise. To make the promise effective both parties must be bound.

Webbe v. Romona Oolitic Stone Co.

5. *SAME—The Agreement Need Not be in Writing.*—An agreement to forbear to sue need not be in writing, nor in any precise words, nor in any express language at all; like other contracts it may be derived from and inferred by the acts and declarations of the parties or the facts and circumstances surrounding the case.

Assumpsit, upon a contract of guaranty. In the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Trial by jury; verdict and judgment for plaintiff; appeal by defendant. Submitted at the October term, 1894. Affirmed. Opinion filed April 4, 1895.

APPELLANT'S BRIEF, DEFREES, BRACE & RITTER, ATTORNEYS.

By the statute of frauds, a collateral promise to answer for the debt of another is required to be in writing. *Starr & Curtis' An. Stat.*, Ch. 59, Sec. 1; *Denton v. Jackson*, 106 Ill. 433-436; *Power v. Rankin*, 114 Ill. 52-55.

The writing must be complete in itself and can not be helped out by parol. It must contain all the essential terms of the contract, expressed with such a degree of certainty as to render it unnecessary to resort to parol evidence to determine the intent of the parties. *Hagan v. Dom. S. M. Co.*, 9 Hun 74; 1 *Brandt on Suretyship*, etc., Sec. 81.

Parol evidence can not be received to supply anything which is deficient in the writing. *Salmon Falls. Mfg. Co. v. Goddard*, 55 U. S. 446; 2 *Rice on Evidence*, Sec. 518, pp. 1262-4.

The mere fact that appellee did in fact forbear to sue, constitutes no sufficient consideration for appellee's promise, unless it had legally bound itself to do so. It is not forbearance in fact, but the agreement to forbear, which makes consideration. There must be a mutual agreement, the consideration being promise for promise. *Cobb v. Page*, 17 Pa. St. 469; *Shupe v. Galbreath*, 32 Pa. Stat. 10; *Brandt on Suretyship*, Sec. 16.

To constitute a forbearance to sue a third person, a good consideration for a promise by a stranger to the original consideration, it must have been in pursuance of an agreement to forbear. *McCorney v. Stanley*, 8 Cush. (Mass.) 85-88; *Browne on Frauds* (4th Ed.), Sec. 190, p. 218.

APPELLEE'S BRIEF, HOYNE, FOLLANSBEE & O'CONNOR,
ATTORNEYS.

The two parts of the paper sued on, being written on the same piece of paper, are to be construed with reference to each other. *Tallman v. Franklin*, 14 N. Y. 584; *Wilkinson v. Evans*, L. R., 1 C. P. 407.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee against appellant upon the following guaranty:

"Memorandum of settlement of bill of S. E. Webbe for stone for Lake View crib, furnished by Romona O. Stone Co.

Bill of all stone in crib.....	\$4,803 75
411.10 furnished by S. E. W., at 50c..\$	205 91
Freight paid.....	1,183 25
Handling 13 stones.....	15 72
Overmeasurement 99° at 50c.....	49 50
	<hr/>
	\$3,349 36
Allowance for discrepancies in in- voices, etc.....	49 36
	<hr/>
	\$3,300 00

In case Mr. Kessler shows order for Nos. 19 and 20 to be 5' .9 wide instead of 2' .0 wide, then there is to be paid in addition \$40.25 for 80.6 difference.

O. K. SAM'L E. WEBBE.

I hereby guarantee payment as follows: One half by the end of October (Oct. 31, '91), and the balance as soon as received from the city, and in any case not over ninety (90) days from date, provided there is no liability on part of their company (the Romona O. Stone Co.), from any mishap which may occur.

WILLIAM E. WEBBE.

October 3, 1891."

Webbe v. Romona Oolitic Stone Co.

The whole of said paper is written on one sheet, and the part commencing, "I hereby guarantee," etc., is in a different handwriting and different ink from the preceding part, but it is written in appellant's own handwriting. The suit was against William E. Webbe, the guarantor, alone, and it is from a judgment rendered against him upon the verdict of a jury that he appeals.

The question is, was there a consideration for the guaranty sued upon? The paper itself expresses none, but the contract of guaranty should be read with reference to the memorandum of settlement that precedes it.

As between the original parties to a paper, the contract, as said in *Prins v. South Branch Lumber Co.*, 20 Ill. App. 236, "is to be gathered from all that appears on it;" or, as it is said, "the contract must be collected from the four corners of the document."

It seems that there were two settlements arrived at between the stone company and Samuel E. Webbe, one on September 17, 1891, and the other on October 3, 1891, when the guaranty of William E. Webbe was given.

The contention by appellee that this last settlement was for an amount less than what was actually owing from Samuel E. Webbe, and was agreed upon in consideration of the guaranty by William E. Webbe, and that he offered to prove that fact but was prevented from so doing by the objection of the appellant to such evidence being sustained by the court, is at most only partly sustained by the record.

The offer by appellant to show what the first settlement was, and the amount that Samuel E. Webbe then owed to appellee, after being objected to by appellant and before a ruling on the objection by the court, was withdrawn by appellant.

Later on, the appellee, in offering the statement and guaranty in evidence, asked the witness how much Samuel E. Webbe owed the plaintiff (appellee) at the time the statement and guaranty was dated, which question, being objected to by appellee, the court inquired if the statement did not show that, and in answer to the court, counsel for

appellant, said : " The statement shows the balance agreed upon. I want to show he (meaning Samuel E. Webbe) really owed more."

Some conversation followed between counsel for appellant and the court, but counsel for appellee have not pointed out to us, and we have not been able to find any ruling by the court, nor any other offer by appellee or any exception taken upon the subject.

There is therefore nothing in the record that presents to us any question upon the effect of proof that the consideration of the guaranty was an agreement to take less than was owing from Samuel E. Webbe to appellee. But is there any other consideration to support the guaranty ? If so, it exists in an implied agreement by appellee to forbear to sue Samuel E. Webbe.

To every contract there must be a consideration to support it, either expressed in words or implied from the very nature of the contract; otherwise the contract would be a *nudum pactum*.

A promise to pay the debt of another in consideration of a forbearance to sue for a time certain, or for a reasonable time, is upon a good consideration; but a mere forbearance, without an agreement to forbear, will not render the promisor liable. *Cobb v. Page*, 17 Pa. St. 469.

It is well settled, that actual forbearance is not enough. The forbearance must be in pursuance of a mutual agreement, the consideration being promise for promise. Consequently, to make the promise effective, both parties must be bound. *Shupe v. Galbraith*, 32 Pa. St. 10.

As already stated, the written guaranty itself expresses no agreement for forbearance by appellee. That instrument bears date October 3, 1891, and the appellant promised to pay one-half of the sum guaranteed by the end of that month, and the balance within ninety days from the date of the guaranty, which would expire on January 1, 1892. Of the amount of \$3,300, specified in the memorandum of settlement between Samuel E. Webbe and the appellee, referred to in the written guaranty, there was paid

on October 31st, \$1,491, a sum \$159 less than one-half of the amount specified; and on January 5, 1892, four days later than the time mentioned in appellant's contract of guaranty, there was paid \$1,500, a sum likewise less than was then due. These payments, it is conceded by appellant's brief, were paid by the principal debtor, Samuel E. Webbe, and this suit against the guarantor was not begun until January 19, 1893.

These facts establish, *prima facie* at least, that there was in fact a forbearance by the appellee to sue the principal debtor; and actual forbearance, taken in connection with the fact of acceptance of the guaranty by the appellee, and of subsequent payments by the principal debtor from time to time not earlier than the times specified in the guaranty, and nothing whatever being shown to the contrary nor offered by the appellant to be shown, the inference or presumption arises that it was agreed by the parties that there should be a forbearance for the time mentioned in the written guaranty.

An agreement to forbear to sue, or to extend the time of payment, need not be in writing, nor in any precise words, nor in express language at all.

As said in *Brooks v. Wright*, 13 Allen 72, "it is a question of mutual understanding and intention, and like other contracts, the agreement of the parties may be derived from and inferred by acts, declarations, facts and circumstances. When such are the sources from which the mutual agreement of the parties is to be gathered, it is for the jury to determine what the intention and understanding were, if any, upon which the minds of the parties met."

It was held in *Walker v. Sherman*, 11 Met. 170, that the slightest damage to the plaintiff, or benefit to the defendant, offered a sufficient consideration to support the promise of the defendant to pay an order accepted by him, and that the fact of forbearance to sue the drawers of the order there involved was sufficient to authorize the inference that the plaintiff agreed so to forbear, and the case of *Breed v. Hillhouse*, 7 Conn. 523, was cited in support of the decision.

In the Connecticut case, which was a suit against the

guarantor of a note, it appears from the statement of facts, as follows:

"To show that the plaintiff agreed, in consideration of the guaranty, to forbear the collection of the note, the plaintiff relied on his acceptance of the guaranty, and on his actual forbearance for the stipulated time—these facts not being disputed."

On the trial below the court instructed the jury that proof of consideration was necessary, but that the plaintiff's receiving the guaranty, and his actual forbearance thereon for the stipulated time, was *prima facie*, and, being unrepelled, sufficient, proof of consideration.

And it was said:

"The agreement in question, to forbear, was clearly proved, on a principle of probable presumption, which harmonizes with common sense, and is conformed to experience; and both reason and experience bear concurrent testimony to the inference of a consideration in this case. The acceptance of the indorsed guaranty, by the plaintiff, and his consequent forbearance, prove the agreement in question, and are incompatible with any other supposition."

Recognizing the weight of those cases we hold that the contract of guaranty by appellant was supported by a consideration and bound the appellant.

There are numerous other errors assigned which we are constrained to omit a discussion of, with the remark that they have been considered, and are not regarded as affecting the substantial merits of the case.

The judgment of the Superior Court will therefore be affirmed.

Fannie Rand v. Martin Purcell.

1. JUDGMENTS—*Rendered in the Appellate Court.*—The Appellate Court can render a judgment upon a finding of facts by it only when the trial below was without a jury.

2. LANDLORD AND TENANT—*Holding Over on an Increase of Rent.*—Where a tenant holds over after the expiration of a former lease, with

Rand v. Purcell.

notice of an increase of the rent, if no new bargain as to other terms is made, he will become a tenant for another year at the increased rent; but as to all other matters the terms expressed in the former lease will govern.

Action for Rent.—In the Superior Court of Cook County on appeal from a justice of the peace; the Hon. JOHN BARTON PAYNE, Judge, presiding. Trial by jury; verdict and judgment for defendant; appeal by plaintiff; submitted at the October term, 1894. Reversed and remanded. Opinion filed April 4, 1895.

COY & BROCKWAY, attorneys for appellant.

WILLIAM A. DOYLE, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee was tenant of a dwelling house of the appellant under a written lease for a year, expiring April 30, 1893, at the rent of \$47.50 per month. Before the lease expired, the appellant notified the appellee that after April 30th if he remained, the rent would be \$50 per month. He remained until September 15th, paying the rent of the previous months, \$50 per month.

The appellant rented the premises—part to one tenant and part to another—how soon, and upon what terms does not clearly appear, though it is testified that the appellant received only \$75 for the months of September, October and November. Why the jury did not allow the defendant \$25 for the half of September during which the appellee did occupy, whatever they concluded upon the testimony as to the terms under which the appellee held over, or why the court did not impose the payment of that sum as terms of refusing a new trial, can only be explained by what seems a fair inference from the record, that the appellant claiming not less than \$75, which she had recovered before a justice, by appeal from whose judgment the case was in the Superior Court, forebore to press the undisputed claim of \$25, fearing the effect upon her larger claim.

Yet that is but an inference, and the appellant did move for a new trial because the verdict was contrary to the law

and evidence in the case, which, being true, she was entitled to a new trial, that she might, at least, recover the \$25. We are asked by the appellant to render a judgment for her here, upon a finding of facts by ourselves. We can only render such a judgment for a plaintiff when the trial below was without a jury. *Union National Bank v. Manistee Lumber Co.*, 43 Ill. App. 525.

Holding over, as the appellee did, after the expiration of the former lease, with notice of an increase of the rent, if no new bargain as to other terms was made, he became tenant for another year at the increased rent, but as to all else, upon the terms expressed in the expired lease. *Miller v. Ridgely*, 19 Ill. App. 306; *Schuyler v. Smith*, 51 N. Y. 309, cited in *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151.

Whether there is any evidence of any new bargain between the parties, which prevented the holding over by the appellee from operating as a lease for another year, we do not discuss.

The judgment is reversed and the cause remanded.

Lesser Franklin v. James A. McDonald, The Loan and Investment Company, of North America, and R. S. Tuthill, Trustee.

1. *ESTOPPEL—By the Acts of a Person.*—Where one is induced by another to occupy a position he would not have occupied but for that other's acts and declarations, the latter will be estopped to deny the consequences thereof.

Bill to Set Aside a Trust Deed.—Error to the Circuit Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed April 5, 1895.

NEWMAN & NORTHRUP, attorneys for plaintiff in error.

BATES & HARDING, attorneys for defendants in error.

Franklin v. McDonald.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The real defendant in error here is the Loan and Investment Company, of North America, which made a loan to McDonald upon a trust deed, in the nature of a mortgage, made to secure an indebtedness of \$1,400. The company advanced to him \$645 on the security, and he then ran away. The plaintiff in error conveyed the property to McDonald by warranty deed; and upon a policy of insurance to McDonald, upon a house on the property, which policy contained a mortgage clause, reading, "Loss, if any, payable to Lesser Franklin as his interest may appear," the plaintiff in error indorsed, "My interest in the within has ceased," with his signature.

The deed of trust, warranty deed and policy were all delivered to the company.

Franklin filed this bill to have the trust deed set aside upon the ground that McDonald never paid for the property, and had agreed that the proceeds of the loan should be paid to Franklin, by the company, of which agreement Franklin alleged that the company had notice before it advanced the \$645 to McDonald.

The court, upon a variety of circumstances and conflicting testimony, found that the company had no notice of such an agreement, nor of any right of Franklin to the proceeds of the loan, and while giving relief to the extent of directing a reconveyance from McDonald to Franklin, yet directed that it should be subject to the trust deed, and dismissed the bill as to the company and the trustee in the deed of trust. To reverse that decree the plaintiff in error prosecutes this writ.

Without setting out at length the evidence, we hold that the conclusion upon it to which the Superior Court came as to notice to the company, was warranted by the evidence, and therefore the decree is affirmed.

Marine Bank Company v. John B. Mallers.

1. PRACTICE—*Orders Nunc Pro Tunc*.—A *nunc pro tunc* order is usually made because something to be done should have been done earlier. What the effect of such an order will be upon the rights of third parties is a question upon which the court, in making this order, does not pass.

2. ASSIGNMENT OF ERRORS—*Absence of*.—Where the record contains no assignment of errors, the court may dismiss the appeal.

Assumpsit.—Appeal from the entry of a *nunc pro tunc* order dismissing the suit. Entered by the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Submitted at the March term, 1895. Dismissed. Opinion filed April 4, 1895.

STATEMENT OF THE CASE.

The Marine Bank Company filed a suit in assumpsit against John B. Mallers in the Superior Court of Cook County, on the 22d day of May, A. D. 1894. The defendant filed on July 5, 1894, a plea. Several months after, the plaintiff, without notice to the defendant, caused to be entered on the 9th day of November, A. D. 1894, an order which appeared on the record, as follows:

“On motion of plaintiff’s attorney, it is ordered that this suit be and is hereby dismissed without costs.”

At the same term at which the order of dismissal was entered, the defendant moved for an order setting aside the dismissal entered, on the ground that after the appearance and filing of pleas on the part of the defendant, an order of dismissal without costs could not be entered without notice to and leave had of the defendant. The attorney for plaintiff, in answer thereto, stated that it had been his intention to enter an order dismissing the suit at plaintiff’s cost, and asked that the court enter a *nunc pro tunc* order, as of date of the original order dismissing the suit at plaintiff’s cost. The court having heard the parties, entered the *nunc pro tunc* order, as asked by the plaintiff, and to this ruling defendant excepted and has taken this appeal.

58	232
58	275
58	282
108	119

Bryden v. Northrup.

CHARLES B. STAFFORD, attorney for appellant.

JAMES C. HUTCHINS and EDWIN BURRITT SMITH, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The record here filed contains no assignment of errors, and we might for this reason dismiss the appeal.

We have, however, considered the brief filed by appellant, and find no sufficient reason for reversing the judgment of the court below. The power of the court to amend its record during the term can not be questioned.

Nunc pro tunc orders are usually made because something ordered should have been earlier done.

It clearly appeared to the court that the dismissal made November 9th, should have been at the costs of the plaintiff; such being the case, the court not only had the power during the term to correct the order it had made, but in its discretion to make the order of November 26th, *nunc pro tunc* as of the 9th. *Ives v. Hulse*, 17 Ill. App. 30; *Horner v. Horner*, 37 Ill. App. 199.

What the effect of a *nunc pro tunc* order will be upon the rights of third parties, is a question upon which the court in making the order does not pass, as it has not passed upon what the effect of this order will be upon collateral interest of the parties to this litigation. *Black on Judgments*, Secs. 136 and 137. The appeal is dismissed.

58 233
63 355

Frederick A. Bryden and Charles E. Steffen v. J. Blanche Northrup and James R. Bryson.

1. INJUNCTIONS—*Unauthorized Occupation by Tenants*.—An injunction will lie to prevent the occupation of demised premises for a purpose prohibited by the lease.

Bill for an Injunction.—Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Submitted at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

ELMER BISHOP and ALLEN, PAYNE & BLAKE, attorneys for appellants.

APPELLEES' BRIEF, BLUM & BLUM, ATTORNEYS.

"It is sufficient to say in general terms that whenever, under the terms of a lease, the lessee is restricted to the use of demised premises in a particular manner or for a specific purpose, a violation of the covenants by a use of the premises in a different manner or for another purpose furnishes ground for the interposition of equity by injunction. And in all such cases a court of equity is regarded as the appropriate forum for administering the law, the jurisdiction being based in part upon principles identical to those which govern the adequate remedy of specific performance, and the necessity of preventing a constantly recurring grievance resulting from the continuous breach of the covenants which can not be adequately compensated by an action for damages." High on Injunctions, Sec. 436; 12 Am. & Eng. Ency. of Law, 1025; Howard v. Ellis, 4 Sandf. (N. Y.) 369; Taylor's Landlord and Tenant, Sec. 691.

And the restriction as to the use of the premises in the original lease is binding upon every sub-tenant, although he may never have seen such lease. Wheeler v. Earl, 5 Cush. C. C. 31; Madox v. White, 4 Ind. 72; Webster v. Nichols, 104 Ill. 106.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee demised premises described in the lease, "the three story and basement brick dwelling known as number one (1) Washington Place," "to be occupied for studio, salesroom and dwelling purposes and for no other purpose whatever."

The appellant Steffen now holds the basement as an under tenant and has fitted it up and begun to keep there what the parties here call a saloon; by which we understand them to mean what in law is a dramshop.

The Superior Court by decree in favor of the appellee, enjoined such use of the basement, from which decree the defendant appealed.

Morier v. Moran.

The words of the lease made a condition that the premises should be occupied "for no other purpose" than those mentioned. *White v. Naerup*, No. 5351, this court.

It is true that "the words of an instrument shall be taken most strongly against the party employing them," but that rule "ought to be applied only where other rules of construction fail." *Broom, Leg. Max.*, 594.

"We must give to the words their common and generally accepted meaning." *Schneider v. Turner*, 130 Ill. 28.

Now while we often hear dramshops spoken of as saloons, and see them so mentioned in city ordinances, and on signs upon them may read, "sample room," "family resort" and, perhaps, other designations, yet no one has, as we verily believe, yet endeavored to attract custom by calling his dramshop a "studio" or a "salesroom."

In a strained construction, a dramshop, being a place where sales are made, might be held to be a salesroom; yet such a construction would violate the rule quoted from 130 Ill.

To prevent the occupation for a purpose within the prohibition in the lease, equity will interfere. *Taylor, Landlord & Tenant*, Sec. 416. The decree is right and is affirmed.

Edmond Morier v. Charles Moran.

1. **CONTRACTS—By Implication.**—That which is implied in a contract is as much a part of the contract as that which is expressed.

2. **SAME—Construction.**—A court will always lean to a construction which makes a contract valid rather than one by which it becomes invalid.

3. **SAME—To Take the Output of a Mine.**—A contract between a dealer in coal and the owner of a mine to take "the entire output of a mine (from one to three cars per day) of lump coal," implies an obligation on the part of the owner of the mine to put out not less than one and not more than three carloads per day, and is one of mutual obligation, the quantity of the output within the limits being at the option of the owner of the mine. A failure on the part of the dealer to

58	235
60	235
58	235
76	400

take the coal according to the contract, renders him liable to respond in damages.

4. *SAME—Breach of—When a Cause of Action Accrues.*—Where a mutual contract was entered into, to take the entire output of a coal mine for a specified season, the quantity being fixed between specified limits, and afterward the purchaser refuses to take the coal according to the contract, such refusal renders it unnecessary for the owner of the mine to take the coal out of the ground, and gives him an immediate right of action. He need not wait until the time mentioned in the contract has expired. He is not bound to take out the coal, trusting to find a market and charge the difference between the contract price and what he might get for it.

5. *VARIANCE—Must be First Raised in the Court Below.*—Where the question of a variance between the allegations and the proofs is not raised in the court below, it can not be raised in the Appellate Court.

6. *EXCEPTIONS—When Deemed to be Abandoned.*—Where exceptions are taken on the trial of a case in the court below, but are not mentioned in the appellant's brief in the Appellate Court, they will not be considered.

7. *INSTRUCTIONS—Disregarded by Jury.*—The fact that a jury disregarded an incorrect instruction, is no ground for reversing a judgment.

Assumpsit.—Breach of contract. Error to the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Submitted at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

BRIEF FOR PLAINTIFF IN ERROR.

When a vendee of goods, sold at a specific price, refuses to take and pay for the goods, the vendor may store the goods for the vendee, give him notice that he has done so, and then recover the full contract price; or he may keep the goods and recover the excess of the contract price over and above the market price of the goods at the time and place of delivery, and this means the market price of such goods, in such condition and in such quantity as the goods were at the time for delivery. In such case, if the goods are bought in large quantities, the market price at retail is not the standard, but the market price in large quantities; or the vendor may, giving notice to the vendee, proceed to sell the goods, in their then condition and quantity, to the best advantage, and recover of the vendee the loss, if the goods fail to bring the contract price. *Bagley v. Findlay*, 82 Ill. 525; *Ames v. Moir*, 130 Ill. 582, at pp. 591, 592; *Trunkney v. Hedstrom*, 131 Ill. 204, at p. 209. .

Morier v. Moran.

BRIEF FOR DEFENDANT IN ERROR, JAMES C. McSHANE,
ATTORNEY.

A party seeking to enforce a contract is not bound to prove performance where the other party has failed to do what constituted a necessary condition precedent of performance on his part. *Aller v. Pennell*, 51 Iowa 537; *Lawyer's Reports Annotated*, Book 3, page 589, note; *Gordon v. Norris*, 49 N. H. 376; *Haines v. Tucker*, 50 N. H. 307; *Collins v. Dalaperte*, 115 Mass. 159; *Ulmann v. Kent*, 60 Ill. 271; *Sanborn v. Benedict*, 78 Ill. 310; *Haskell v. Hunter*, 23 Mich. 305; *Camp v. Hamlin*, 55 Ga. 259; *McCracken v. Webb*, 36 Iowa 551; *Dustan v. McAndrews*, 44 N. Y. 72; *Hayden v. Demets*, 53 N. Y. 426.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Edmond Morier and Arthur W. Underhill were sued by Charles Moran for not taking coal under a contract with him. Underhill was not served with process. On the trial but two exceptions were taken, and those related only to matters not alluded to in the brief for the plaintiff in error, and therefore not to be considered. *City of Mt. Carmel v. Howell*, 137 Ill. 91.

No objection to the declaration was made below, nor does any assignment of error here question its sufficiency. No variance between the declaration and evidence was pointed out below, and therefore no question of variance can be raised here. *Consolidated Coal Co. v. Wombacker*, 134 Ill. 57.

The case is here upon its intrinsic merits. If upon any pleadings, with no incorrect instructions, a jury might find a verdict for Moran for \$2,500, that being the amount of the judgment, then this judgment should be affirmed.

That the jury disregarded an incorrect instruction in favor of Morier, is no ground for reversing. *McNulty v. Ensich*, 134 Ill. 46. The evidence as to any contract is as follows:

CHICAGO, Oct. 19, '89.

CHARLES MORAN, Esq., 309 Jackson St., Danville, Ill.

Our Mr. Morier, when in your town a few days ago, or-

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Morier v. Moran.

dered a car of coal. We would like to try your coal, and if you will give us the output of your mine we will give you \$1.20 per ton during the winter and \$1.15 for the summer, if the coal is satisfactory.

Would it pay you better to load mine run? We have an order for about 100 cars, to be shipped in lots of ten cars, or would take car per day, or more, if it would be convenient to ship this way.

We can not afford to pay more than 90 c. per ton for this, but we should think it would pay you better at this price than to screen your coal. In this manner you could sell all the coal you mined. In other words, you would be paid for all the nut and screenings. Let us hear from you at an early date, because if we make arrangements for your coal we are ready to take it at any day; sooner the better. Let us know if you have shipped the sample car, and furnish us car number. Yours truly,

MORIER, UNDERHILL & Co.

CHICAGO, Oct. 28, '89.

CHARLES MORAN, Esq., Danville, Ill.

DEAR SIR: We are in receipt of your letter of the 28th, offering us the putout of your mine of lump coal, and we herewith enclose a contract which, if satisfactory, please sign and return to us.

It must be understood that in view of our giving you this price, we must have good, clean coal, as we can buy all we want for less money, but our object in making this arrangement with you is to get some cleaner coal, so you will exercise great care in loading.

You can commence to ship at once and notify us promptly of daily shipments. We wish you would give us a car of screenings occasionally, as we will require more than we are getting at present.

When writing, state what time the train leaves the mine, as we will telegraph you some time, and would like to know how late in the day we can do so.

Yours truly,

MORIER, UNDERHILL & Co.

Morier v. Moran.

CHICAGO, Oct. 28, '89.

CHARLES MORAN, Danville, Ill.

DEAR SIR: We hereby agree to take the entire out-put of your mine (from one to three cars per day) of lump coal, clean forked, and free from stone, at the following figures, viz: From November 1, 1889, to March 1, 1890, at \$1.25 per ton of 2,000 lbs. From March 1, 1890, to September 1, 1890, at \$1.15 per ton of 2,000 lbs. Shipments to be made daily; settlement at the end of each month for coal bought the preceding month.

Yours truly,

MORIER, UNDERHILL & Co.

CHARLES MORAN.

Now, as Morier, Underhill & Co. could not take the "out-put" unless Moran would put out, his signature was an agreement on his part that he would put out, not less than one car per day, with the privilege to put out three cars per day. What is implied in a contract is as much a part of the contract as what is expressed. Bishop on Contracts, Sec. 241.

And the words of the last writing, without referring to the previous letters, imply an obligation on the part of Moran to put out not less than one and not more than three carloads per day. Broom, Leg. Max., 667; Memory v. Niepert, 131 Ill. 623; Allamon v. Mayor of Albany, 43 Barb. 33; Genet v. Del. & Hud. Canal Co., 136 N. Y. 593; Hudson Canal Co. v. Penna. Coal Co., 8 Wallace 276, I refer to, without copying at length, as authority explicit and abundant.

The contract, therefore, is one of mutual obligation, the quantity, within the limits, being at the option of Moran.

During November Moran shipped twenty-eight cars. Very soon thereafter, by letters in the record which the abstract fails to notice, Morier, Underhill & Co. commenced to order that less and less coal be shipped to them. Moran kept loaded cars on a side-track awaiting their orders.

June 20th, the firm wrote to Moran to ship but one car per week, to which Moran replied that he considered that "the same as a quit, as I can not run a mine on one flat per week." He sent two cars in July and that was the end of

the trade. No orders were ever sent that were not filled, and, so far as appears, without delay.

The verdict settles that there was no just ground of complaint of the quality of the coal. The real trouble, as the letters of the firm show, was that they could not dispose of the coal. That was their risk. Their refusal to take the coal according to the contract rendered it unnecessary for Moran to take the coal out of the ground. The act would have been useless. See cases cited in *Pulling v. Travelers Ins. Co.*, 5,285 last term.

The coal was in the ground, and Moran had facilities for taking out forty to fifty tons per day, and thus his ability to fill the contract is proved. Coal had gone down in the market, and from the profit to him in filling the contract, his readiness and willingness may be inferred. *Coonley v. Anderson*, 1 Hill (N. Y.) 519.

Indeed, the refusal of the firm to take the coal as the contract required, gave Moran an immediate right of action. He did not need to wait until the time mentioned in the contract had expired. *Follansbee v. Adams*, 86 Ill. 13, and cases there cited.

If the testimony of Moran that the mine would be of no less value with the coal to fill the contract taken out, than with the coal in, is to be accepted, then Moran has not recovered full damages. He was not bound to take out the coal, trusting to finding a market, and charge the difference between the contract price and what he might get. But the question of the *quantum* of the damages is not before us. Excessive damages was not assigned as a ground in the motion for a new trial. *Heffron v. Brown*, 54 Ill. App. 377.

We purposely refrain from considering whether the doctrine of *Schneider v. Turner*, 27 Ill. App. 220, 130 Ill. 28, has any application to this case. Counsel have not alluded to it. *Campion v. Smith*, 46 Ill. App. 501.

The judgment is affirmed.

MR. PRESIDING JUSTICE WATERMAN.

I do not regard the contract as giving any option. The contract was for the entire output of a certain mine; the

Keenan v. The People.

statement "From one to three cars per day" did not give to the proprietor of the mine an option to supply one, two or three cars per day. The statement was inserted for the purpose of showing what was in the minds of the parties when the contract was made—what it was expected would be done under it.

It appears that appellee had been for some years, and then was, operating a coal mine. Appellant visited the mine for the purpose of buying coal; saw appellee loading coal. It was for the entire product of a mine then being operated and of which each party had knowledge, that the agreement was entered into. Under such a contract, so made, appellee became bound to use reasonable effort to keep the product of his mine at what it was; and neither considerably below one or above three cars per day. Appellee had not the right if coal went up to reduce his output to one car per day; as appellant had not the right if coal went down to decline to take more than one car per day.

This construction is, I believe, not only in harmony with the language used, considered from the standpoint occupied by the parties when the contract was made, but with the law of this State.

A court will always lean to a construction which makes a contract valid rather than to one by which it becomes invalid.

P. H. Keenan v. The People of the State of Illinois.

1. **ELECTIONS—Ballots Returned to the Commissioners Not to be Opened.**—In the act of June 22, 1891 (R. S., 1893, Ch. 46), there is no provision permitting the election commissioners to open the sealed packages in which the ballots are by the judges of election inclosed, save in the case of a contested election, and the election commissioners are forbidden to open such packages under any other circumstances.

2. **ELECTION COMMISSIONERS—Can Not be Compelled to Produce Ballots Before Grand Jury.**—The election commissioners can not be compelled to produce before the grand jury the ballots voted at an election and returned to said commissioners from the precincts by the

judges of election under section 27 of the act of June 22, 1891. (R. S., 1891, 685.)

3. *COURTS—Power to Require the Production of Ballots.*—A court has no power to require the election commissioners to produce and submit to examination the ballots in their keeping, except in the case of an election contest.

4. *SAME—Power to Compel Obedience to the Law.*—Courts do not make the law. They may and do declare what it is and may compel obedience to it; they have no power to command any one to disobey the law, or to do that which it does not enjoin.

5. *CONTEMPT OF COURT—Erroneous and Void Orders.*—An order of court which is merely erroneous must be obeyed; he who disobeys such a mandate commits a contempt for which he may be punished, but an order in excess of the powers of the court is without jurisdiction and void; disobedience to it is not a contempt.

Contempt of Court.—Error to reverse an order of the Criminal Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1895. Reversed. Opinion filed April 4, 1895.

STATEMENT OF THE CASE.

The events and proceedings which resulted in the fine imposed upon the plaintiff in error by the judgment of the Criminal Court of Cook County, are briefly as follows:

December 19, 1893, a special election for mayor of the city of Chicago was duly held. On April 3, 1894, an election of town officers and aldermen was duly held in Chicago, both elections having been conducted under the provisions of the act regulating elections in cities, towns and villages, enacted June 19, 1885, and adopted by the city of Chicago in the same year.

The votes cast at this last election were duly canvassed by the board of canvassers, consisting of those who at that time were election commissioners of said city, and also of the city attorney and the judge of the County Court. On April 9, 1894, the County Court of Cook County in accordance with the certified copy of the record of this canvass, issued to those declared elected thereby, certificates of election.

The envelopes containing the ballots, duly sealed, subscribed and indorsed, according to law, were duly delivered to said election commissioners, and remained in the exclu-

sive custody of the commissioners, as required by law, until and after May 11, 1894.

On May 7, 1894, a *subpoena duces tecum* was issued out of said court, addressed to the election commissioners and their clerk.

Said subpoena directed the commissioners and their clerks to appear before the grand jury to give evidence "concerning a certain complaint made before said election commissioners against John G. McMahon, James Maroney and George W. Heck," and to bring the registry books, poll books and tally sheets of the election held April 3, 1894, "in the 22d precinct of the 29th ward of said city of Chicago," and also all ballots voted and returned to said commissioners from said precinct at said election.

The election commissioners and their clerks appeared before the special grand jury with all the records called for, except said ballots voted and returned, which they submitted to said grand jury they could not, as advised by their counsel, produce without violation of the statutes of the State and their oaths of office.

A rule to show cause why they should not be attached for contempt was thereupon entered against said commissioners. An answer to said rule was filed, wherein plaintiff in error and his fellow-commissioners and their clerk, disavowing any intentional contempt of court, responded to the rule, justifying their action as that which the law required of them in their respective offices. The court thereafter entered an order adjudging said commissioners guilty of contempt of court, and that each of them be fined the sum of \$1,000.

To reverse which order the writ of error herein has been sued out, and errors are assigned questioning the jurisdiction and power of the court below, and the form, substance and validity of said order.

BRIEF OF PLAINTIFF IN ERROR, LAWRENCE P. BOYLE AND MORAN, KRAUS & MAYER, ATTORNEYS.

If produced and opened as required by the Criminal Court, the ballots would have been rendered useless as evidence in

an election contest, and would also have become incompetent upon the hearing of any criminal case. Their use as evidence would have been utterly destroyed. In order to constitute competent evidence, they must be carefully preserved in strict accordance with the statute. *State v. Bate*, 70 Wis. 409, 412, 413; *McCrary on Elections*, 3d Ed., Secs. 436, 438, 445; *Cooley's Con. Lim.*, 6th Ed. 788; also cases cited under note 1, page 799; *Albert v. Twonig*, 52 N. W. Rep. 582, 584; *Hudson v. Solomon*, 19 Kas. 177; *State v. Bate*, 70 Wis. 409, 413; *Kingery v. Berry*, 94 Ill. 515; *People v. Livingston*, 79 N. Y. 279; *Hartman v. Young*, 20 Pac. Rep. 17; 17 Or. 150; *Powell v. Holman*, 6 S. W. Rep. 503, 505; 50 Ark. 85; *Reynolds v. State*, 61 Ind. 392; *Coglan v. Beard*, 65 Cal. 58.

"Where, as is the case in several of the States, the statute provides a mode of preserving the identical ballots cast at an election, such statute, and particularly those provisions which provide for the safe keeping of such ballots, must be followed with great care. Such ballots, in order to be received in evidence, must have remained in the custody of the proper officers of the law from the time of the original official count until they are produced before the proper court or officer, and if it appear that they have been handled by unauthorized persons, or that they have been left in an exposed and improper place, they can not be offered." *McCrary on Elections*, Secs. 436, 438, 445.

If, however, the ballots have not been kept as required by law, and surrounded by such securities as the law prescribes, it would seem that they should not be received in evidence at all. *Cooley's Con. Lim.* 788.

The statute against package being opened (*Rev. Stats. of 1893*, Chap. 46, Secs. 59 and 314, p. 8, *supra*), is modified by the single proviso excepting election contests. The introduction of this exception is necessarily exclusive of all other independent exceptions. *Sutherland on Stat. Con.*, Secs. 325, 328; *Broom's Legal Maxims*, star pages 638 to 640 (6th Am. Ed.); *Dutton v. City of Aurora*, 114 Ill. 138, 143, 144; *Eldridge v. Pierce*, 90 Ill. 474, 482, 483; *State v. Board Pub-*

lic Schools, 112 Mo. 213, 218; Potter's Dwaris on Statutes, 221; Gaddis v. Richland County, 92 Ill. 119, 124; Rammis v. Clark, 13 Ill. 544, 546.

Civil contempts are those *quasi* contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court; while criminal contempts are all those acts in disrespect of the court or of its process, or which obstruct the administration of justice, or tend to bring the court into disrepute, such as disorderly conduct, insulting behavior in the presence or immediate vicinity of the court, or acts of violence which interrupt its proceedings; also disobedience or resistance of the process of the court, etc. Rapalje on Contempt, Sec. 21.

The Supreme Court of this State has uniformly held that acts in disrespect of the court, or its process, which obstruct the administration of justice, are in the nature of criminal offenses. Beattie v. The People, 33 Ill. App. 651; Stuart v. The People, 3 Scam. 395; Haines v. The People, 97 Ill. 161; The People v. Neill, 74 Ill. 68.

By these and the following authorities the distinction between civil and criminal contempts is made clear, as is also the fact that refusal to obey a subpoena is a criminal contempt. People v. Lester, 150 Ill. 408, 423; People v. Diedrich, 141 Ill. 665; Rawson v. Rawson, 35 Ill. App. 505; Leopold v. People, 140 Ill. 552; Bonner v. People, 40 Ill. App. 628; De Beukelear v. People, 25 Ill. App. 460. A criminal contempt is a recognized criminal offense—a misdemeanor at common law. In Beattie v. People, 33 Ill. App. 651, *supra*, it was expressly held that a criminal contempt was a misdemeanor and its prosecution barred by the statutes of limitation governing the prosecution of misdemeanors. The court say, p. 662: The punishment of contempt fixes its character as a misdemeanor, as the penalty may be either by fine or confinement in jail or both. Larkin v. The People, 94 Ill. 501; Rawson v. Rawson, 35 Ill. App. 505; Bonner v. People, 40 Ill. App. 628.

There can be no doubt that the order was void in impos-

ing such fine of \$1,000, and also in committing plaintiff in error to jail until such fine was paid, which might result in commitment for more than one year. *Lamkin v. People*, 94 Ill. 501; *In re Patterson*, 99 N. Car. 407, 418; *Shank's Case*, 15 Abb. Pr. (N. Series) 38; *People ex rel. Stokes v. Risley*, 38 Hun. 280; *People v. Carter*, 48 Hun 165; *Ex parte Stewart*, 16 Neb. 193 (S. C., 20 N. W. Rep. 255); *Church on Habeas Corpus*, Secs. 385, 353a.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Section 27 of an act approved June 22, 1891, in force July 1, 1891, Revised Statutes, 1893, Chap. 46, Sec. 314, in pursuance of which, the election had in Chicago April 3, 1894, was held, provides that—

“When the canvass of the ballots shall have been completed, as now provided by law, the clerks shall announce to the judges the total number of votes received by each candidate; each judge of election in turn shall then proclaim in a loud voice the total number of votes received by each of the persons voted for, and the office for which he is designated, and the number of votes for, and the number of votes against any proposition which shall have been submitted to a vote of the people; such proposition (proclamation) shall be *prima facie* evidence of the result of such canvass of the ballots. Immediately after making such proclamation, and before separating, the judges shall fold in two folds, and string closely upon a single piece of flexible wire, all ballots which have been counted by them, except those marked ‘objected to,’ unite the ends of such wire in a firm knot, seal the knot in such a manner that it can not be untied without breaking the seal, inclose the ballots so strung in an envelope, and securely tie and seal such envelope with official wax impression seals, to be provided by the judges, in such manner that it can not be opened without breaking the seals, and return said ballots, together with the package containing the ballots marked ‘defective or objected to,’ in such sealed package or envelope, to the proper clerk or to the

board of election commissioners, as the case may be, and such officers shall carefully preserve said ballots for six months, and at the expiration of that time shall destroy them by burning, without previously opening the package or envelope. Such ballots shall be destroyed in the presence of the official custodian thereof, and two electors of approved integrity and good repute, and members, respectively, of the two leading political parties. The said electors shall be designated by the county judge of the county in which such ballots are kept; provided, that if any contest of the election of any officer voted for at such election, shall be pending at the expiration of said time, the said ballots shall not be destroyed until such contest is finally determined. In all cases of contested elections, the parties contesting the same shall have the right to have said ballots opened, and to have all the errors of the judges in counting, or refusing to count, any ballot corrected by the court or body trying such contest, but such ballots shall be opened only in open court, or in open sessions of such body, and in the presence of the officer having the custody thereof."

There is to be found in the law under which the election of April 3, 1894, was held, no provision permitting the election commissioners to open the sealed packages in which the ballots are by the judges of election inclosed, save in the case of a contested election; and it is manifest that the commissioners are forbidden to open such packages under any other circumstances.

Courts do not make the law; they may and do declare what it is, and may compel obedience to it; they have no power to command any one to disobey the law, or to do that which it does not enjoin.

The election commissioners being forbidden to open the packages in which the ballots intrusted to their care are contained, except in the case of an election contest, a court has not power to, under other circumstances, require them to produce and submit to examination the ballots in their keeping.

It is immaterial what the public agency may be which seems to demand that public officers or private citizens vio-

late the law; neither for the purpose of convicting the guilty or acquitting the innocent, have courts authority to direct any one to act in disregard of the law.

In considering the validity of an order collaterally attacked, as is the order directing the plaintiff in error to produce certain election ballots, the distinction between orders which are merely erroneous, and hence liable to reversal, and orders which are void because the court has no power to make them, must be kept in mind.

An order of court which is merely erroneous must be obeyed; he who disobeys such a mandate commits a contempt for which he may be punished. *Kerfoot v. The People*, 51 Ill. App. 409.

If the only reason for refusing to produce the ballots was that the evidence that might be afforded by them would be immaterial, irrelevant, or not competent in the matter under examination in the Criminal Court, a very different question from that presented by the record of this cause would be before us. *People v. Lester*, 150 Ill. 408-423; *Kerfoot v. The People*, 51 Ill. App. 409; *In re Brown*, 97 Cal. 83.

The order of the Criminal Court being in excess of its powers was without jurisdiction and therefore void. Its disobedience was not contempt.

The order imposing a fine upon the plaintiffs in error is reversed.

C. J. Cooper v. Chicago Cottage Organ Company.

1. **PROMISSORY NOTES—*Meaningless Conditions.***—Adding to an ordinary and unconditional promissory note the words, "title not to pass until this note is paid in full," is substantially meaningless when read in connection with the rest of the note.

2. **POSSESSION—*Of Personal Property Unexplained.***—Possession of personal property unexplained implies title in the possessor.

Assumpsit, on a promissory note. Error to the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

Cooper v. Chicago Cottage Organ Co.

C. C. SPENCER, attorney for plaintiff in error.

CRATTY BROS. and MACLAREN, JARVIS & CLEVELAND, attorneys for defendant in error.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This cause was tried below before the court without a jury, upon an agreed statement of facts, abstracted as follows:

"A certain promissory note was executed and delivered by C. J. Cooper, the defendant, to one N. D. Coon. Said note was given for the purchase price of a piano, and it was written on the face of said note, 'Title not to pass until this note is paid in full.' The piano in question was delivered to defendant in pursuance of the terms of the note. Said piano was afterward, while in the possession of defendant, without the fault of any one, destroyed by fire. The note in question was duly assigned to the plaintiff after maturity. There is unpaid on said note the sum of \$200."

The Superior Court gave judgment for the amount remaining unpaid on said note, and costs, and from that judgment this writ of error is prosecuted.

The substance of the contention of plaintiff in error is, that in some way the record discloses a contract between the parties to the original agreement with reference to the sale and purchase of the piano for which the note was given, under which the title of the piano did not pass to the vendee, the maker of the note; that the title to the piano remained in the vendor, and was to remain there until the note should be paid, and that the piano being, therefore, the property of the vendor at the time of its destruction, without the fault of the vendee, the vendor must bear the loss. It is not necessary to consider what the law would be with reference to such an assumption of facts, for the record does not disclose such a state of facts to exist.

The adding to the note the words, "title not to pass until this note is paid in full," is substantially meaningless when read in connection with the rest of the note. It does

not appear that the note was anything but an ordinary and unconditional promissory note, with the quoted words written on its face. So far as appears, the note itself contained nothing about its consideration being a piano.

The suit was begun originally before a justice of the peace. No copy of the note is set out in the abstract of the record, which must be deemed sufficiently full to present all errors relied upon. Ry. Co. v. Wolf, 137 Ill. 360.

We can therefore only see what is in the statement of facts, the abstract stating that there was no other evidence offered on the trial of the cause, and from that we have no doubt that the judgment was right.

Possession of the piano, unexplained, implies title in the possessor. If such was not the intention of the parties, it should have been made to appear. The judgment will be affirmed.

William Graver Tank Works v. James McGee.

1. MASTER AND SERVANT—*Dangerous Employments*.—The rule that a master is bound to use reasonable care to furnish a reasonably safe place for the servant to work, and to use reasonable care to protect him from dangerous machinery and hazardous methods of conducting business, is qualified by the rule that if the master fails in such respects, and the servant, being fully advised of the dangers, continues without objection and voluntarily to work in the unsafe place, or in proximity to the dangerous machinery, or under the hazardous conditions of conducting the business, he takes the chances of the obvious and known danger.

2. INSTRUCTIONS—*Assuming What Constitutes Negligence*.—In an action for personal injuries received by a servant while working in a dangerous place, an instruction which tells the jury that under certain circumstances recited, the failure of the defendant to use certain precautionary measures also recited, is negligence, is erroneous as assuming what constitutes negligence.

3. SAME—*Waiver of Risks Incident to the Employment*.—When an instruction assumes certain facts to be negligence, it does not follow that the injured person had not the right to waive the risk incident to such negligence and take the risk himself, and whether he did so or not, ought to have been submitted to the jury.

4. SAME—*Invading the Province of the Jury*.—It is error to instruct a

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William Graver Tank Works v. McGee.

jury as to what facts constitute negligence and want of ordinary care, and as to who under given facts are as a matter of fact fellow-servants; such questions are facts for the jury to determine from the evidence.

Trespass on the Case, for personal injuries. Error to the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard at the March term, 1895. Reversed and remanded. Opinion filed April 4, 1895.

WALKER & EDDY, attorneys for plaintiff in error.

P. McHUGH, attorney for defendant in error; KING & GROSS and ANDREW J. HIRSCHL, of counsel.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The defendant in error had one of his eyes knocked out by an iron chip which flew from a steel bar that was being cut with a cold chisel in the works of the plaintiff in error.

He was working as helper to a blacksmith, and on the day in question was engaged in carrying pieces of iron, called manheads, to the forge at which the blacksmith worked, in the southeast corner of the shop, which was about fifty feet wide from east to west, and one hundred feet long from north to south.

The manheads were to be brought to the forge from a pile situated some twenty feet in a northwesterly direction from the forge. About sixteen feet directly north from the forge was situated the cutting block, where the steel bar from which the chips flew was being cut, and the block and the pile of manheads were from ten to sixteen feet apart and nearly east and west from each other.

At the cutting block a man named Sheets and his helper were at work trimming off the ends of bars of steel. The method of doing the work was for Sheets to hold the chisel, and his helper to strike it with a hammer or sledge. Chips frequently flew from the bars, flying with varying force to various distances, according to the hardness of the bar, from eight feet or less, to one hundred feet, and they were cutting in a westerly direction, viz., in such a manner as the chips would fly in a westerly direction. It seems from the

evidence that the cutting was not always done in the same direction, but depended upon the direction from the block in which the men were working in the shop.

On the occasion in question, it appears that the cutting block pointed northwest and that Sheets was facing northerly, holding the chisel in his left hand and steadying the bar with his right, and that his back was toward the course which the defendant in error pursued in passing from the forge to the pile of manheads, and that there was no one working at the west side of the shop.

The defendant in error had worked in the shop as a laborer and helper for more than a month, and on the day in question commenced work at seven o'clock in the morning, and worked at the particular job of carrying manheads until between four and five o'clock in the afternoon, when the accident happened. He had never before that day worked at the forge, but had worked at other jobs in the shop and in the yard, and on that day had passed the cutting block back and forth a good many times, as he testified, seeing, but without heeding the work that was going on there.

Upon the facts thus briefly, but in substance, stated, if the verdict of the jury had been rendered upon correct instructions it would be a question whether the judgment of \$1,500 that was entered, should be affirmed or reversed. The rule that a master is bound to use reasonable care to furnish a reasonably safe place for the servant to work, and to use reasonable care to protect him from dangerous machinery and hazardous methods of conducting business, is qualified by the other rule, that if the master fails in such respects, and the servant being fully advised of the dangers, continues without objection and voluntarily to work in the unsafe place, or in proximity to the dangerous machinery, or under the hazardous conditions of conducting the business, he himself takes the chance of the obvious and known danger. *Buhle v. Harland*, 37 Ill. App. 350; *Glass v. C. R. I. & P. Ry. Co.*, 41 Ill. App. 87.

The evidence disclosed that chips of iron or steel would

almost inevitably fly from the chisel and sledge, when the work of cutting or trimming ends of bars was being done, and that they would frequently fly with great force to a much greater distance from the cutting block than that at which the defendant in error was working; and that a safe and prudent way to conduct such work was by the intervention of a simple screen in front of the cutting block in the direction in which the chips would naturally fly.

The defendant in error had worked in and about the shop for more than four, and possibly for eight weeks, and probably had observed and knew what every man of reasonable and ordinary sense would be liable to observe and know under like circumstances, that to pass or stand in front of the cutting block, in line with the direction in which the cutting was being done, was dangerous.

True, it would be a question of fact for a jury, whether the defendant in error had observed and did know the danger of working where and as he did, but it was error to instruct the jury, as was done by plaintiff's first instruction, that under the circumstances therein recited, "the failure of the defendant to use a guard or protection to prevent the chips from flying, was negligence, and the jury should find for the plaintiff," without any allusion in the instruction to the fact of whether the plaintiff had knowledge, or lack of knowledge, of the danger existing in the absence of such precautions, and his assumption of the risk of the employment in face of such danger. That the jury might have found, as they probably did, that the absence of such simple devices for guards or screens, as was shown would, if provided, have afforded protection, was negligence by the plaintiff in error, is probably too plain for argument, and assuming it to be such, it does not follow that the defendant in error had not the right to waive the risk incident to such negligence, and take the risk himself, and whether he did so or not ought to have been submitted to the jury.

Other instructions given for the plaintiff are objectionable also, in so far, at least, as they instruct the jury as to what facts constitute negligence and want of ordinary care, and

as to who, under given facts, are, as a matter of law, fellow-servants. Such questions are facts for the jury. *C. & N. W. Ry. Co. v. Bouck*, 33 Ill. App. 123; *I. C. R. R. Co. v. Slater*, 39 Ill. App. 69; *Chicago v. McLean*, 138 Ill. 148.

The judgment of the Circuit Court will be reversed and the cause remanded.

John Condon and J. A. Webb v. Charles Bruse and Company.

1. **GUARANTY**—*Contract of—When Implied.*—Names written upon the back of a promissory note, imply a guaranty, not conclusively, but *prima facie*, subject to evidence as to what may have been the real contract.

2. **PROMISSORY NOTES**—*Blank Indorsements.*—An implied contract need not be written out. Where names are indorsed in blank upon a promissory note, filling up the indorsement is mere form, and may be wholly omitted.

Assumpsit, on a contract of guaranty. Error to the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1895. Remittitur ordered, etc. Opinion filed April 4, 1895.

EDWARD H. MORRIS, attorney for plaintiffs in error.

ISRAEL COWEN, attorney for defendants in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The plaintiffs in error wrote their names upon the back of a promissory note, payable to the defendants in error, purporting to be made by the "Indiana Racing Ass'n," described in the declaration as the "Indiana Racing Association."

Their names, so written, imply a guaranty—not conclusively, but *prima facie*—subject to evidence as to what may have been the real contract. *Kingsland v. Koepp*, 35 Ill. App. 81; 137 Ill. 344. And the contract implied need not

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ever be written out. Filling up such an indorsement is mere form, and may be wholly omitted. *Kuehne v. Goit*, 54 Ill. App. 596.

The abbreviation "Ass'n" for "Association" is in common use and well understood. *State v. Vaile*, 26 S. W. Rep. (Mo.) 672.

In pleading, not descriptively *in hæc verba*, but the legal effect, the use of the full word is not a variance from the instrument. *Earl of Shrewsbury's case*, 9 Coke, 42.

The demurrer to the plea of Condon, denying the making of the note by the Indiana Racing Association, should have been sustained. Condon was not at liberty to make such a defense. *Bestor v. Walker*, 4 Gilm. 3. His indorsement was a warranty that the note was what it purported to be. *Randolph, Com. Pap., Sec. 752*. That the plea was verified, had no effect.

The action was not upon the note, but upon the indorsement, and so was not within Practice Act, Sec. 34.

The mistake of the court in holding the plea good does not now entitle the plaintiff in error to anything. *McNulta v. Ensich*, 134 Ill. 46.

The promise in the note was to pay "with reasonable attorney fees." If those fees could be collected from the plaintiffs in error at all, they could not be so collected in this suit. They accrued, if ever, after this suit was commenced. *Nickerson v. Babcock*, 29 Ill. 497.

The amount due upon the note, principal and interest, at the time of the trial, was \$1,307.88. The verdict and judgment are \$1,435.41, an excess of \$127.53, for the protest was an idle ceremony.

If the defendant in error, within ten days from the filing of this opinion, remit from the judgment \$127.53, the residue of the judgment will be affirmed; if not, it will be reversed and the cause remanded; in either event the costs fall on the appellees.

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Hartford Deposit Company v. The Chemical National Bank and Eli C. Tourtelot, Receiver.

1. NATIONAL BANK—*Not Relieved of its Contract by Insolvency.*—A national bank, lessee of premises for a term of years, which during the term becomes bankrupt, is not thereby discharged from its obligation to pay rent in accordance with the terms of the lease.

Assumpsit, for a failure to pay rent. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Submitted at the March term, 1895. Reversed. Judgment entered in this court. Opinion filed April 4, 1895.

BURNHAM & BALDWIN, attorneys for appellant.

DUNCAN & GILBERT, attorneys for appellees.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The Chemical National Bank of Chicago entered into a lease, dated November 18, 1892, with the appellant, the Hartford Deposit Company, of a banking office in a certain building, owned by the said Hartford Deposit Company. In accordance with its terms, the bank paid \$2,500 on the delivery of said lease. The term was for a period of five years, from May 1, 1893, at an annual rental of \$12,000, payable in equal monthly installments of \$1,000, in advance, exclusive of and in addition to said first payment of \$2,500. The bank entered into and took possession of said premises on May 1, 1893, the first day of said term, and the first installment of rent fell due and was payable on that day. This installment was not paid when due, nor had it or any part of it been paid when, on May 9, 1893, the bank became insolvent, and a national bank examiner took possession of its assets and of said premises.

On July 21st a receiver was duly appointed, and on July 27th he notified the Hartford Deposit Company of his election to terminate said lease after July 31, 1893, so far

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as he, as receiver, was concerned. On the same day, namely, July 27th, said receiver paid to the Hartford Deposit Company the sum of \$2,709.68, which was as agreed the ratable amount of rent due for the period May 1st to July 31st, inclusive. No other or further rent was paid under said lease by any other person or at any other time. The premises remained vacant until May 1, 1894, when they were re-let at a reduced rental. This suit was brought to recover damages for failure to pay rent for the period August 1, 1893, to April 31, 1894, during which the premises remained unoccupied, claimed to amount to \$9,000.

The cause was submitted to the court below, without a jury, upon an agreed statement of facts, which concluded as follows:

"If, upon the foregoing facts, the court is of the opinion that the plaintiff is entitled to recover of the defendants, or either of them, judgment is to be rendered in favor of the plaintiff and against one or both of the defendants, as the case may be, said judgment to be in such form as the law may require and to be for such sum as the court shall, from the foregoing facts, determine the plaintiff to be entitled to recover.

If, on the other hand, the court is of the opinion upon the foregoing facts, the plaintiff is not entitled to recover of the defendants, or either of them, judgment is to be rendered in favor of the defendants and against the plaintiff for costs of suit."

The court found that the lessor, the appellant, was not entitled to recover against either the bank or its receiver, and gave final judgment accordingly.

The rendition of such judgment is the sole error that is assigned, and the question, as said in the brief of counsel for appellees, is simply "whether, in the case of a lease to a national banking association of a banking room for a term of years, the lessor can recover against such association, or its receiver, for rent accrued under the lease subsequent to its insolvency, and the appointment of a receiver to close up its business under the national banking laws, and after

the receiver has abandoned or surrendered up the leased property to the lessee."

We are not able to appreciate the distinction between the liability of an insolvent national bank in the hands of a receiver under the provisions of the National Bank Act, but whose charter has not been judicially, or otherwise, forfeited, and other corporations or individuals whose estates are in insolvency, with reference to their liability on contracts competently and in good faith entered into before insolvency. The bank act itself creates no such distinction, and the cases that are cited, *Fidelity Safe Dep. & T. Co. v. Armstrong*, 85 Fed. Rep. 567, *Deane v. Caldwell*, 127 Mass. 242, and *White v. Knox*, 111 U. S. 704, do not afford it support.

The first cited case occurred in, and was decided by the district judge for the southern district of Ohio, and was a case where default in the payment of rent did not occur until after the charter of the bank had been forfeited and the bank had passed out of existence, and had no successors who, in the eye of the law, stood in its place.

The second cited case, that in Massachusetts, was, if not controlled by the peculiar provisions of the insolvency statutes of Massachusetts, determined upon the fact found by the court—that the surrender of the lease and its acceptance by the lessor, being absolute and unqualified by the reservation of any right to sue or prove up, terminated the lease and all liability upon the covenants thereof.

The last cited case, in the United States Supreme Court, decides only that the creditor of an insolvent national bank who establishes his claim, including interest, by suit, is entitled to share in dividends on his debt upon its value only as of the day of the failure of the bank—the same day as the claims of other creditors were computed up to—in order that all claims should be paid ratably in accordance with the provisions of the National Bank Act.

The lease in question was a lawful contract and engagement for the bank to make. The first monthly installment of rent was due under it nine days before the bank sus-

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pended. By its terms the default that was made by the bank in the non-payment of rent on May 1st, gave the right to the appellant to re-enter and terminate the lease. The damages were then matured and could have been at once sued for, or appellant could defer its suit, as it did, until by a re-letting of the premises the extent of damages had been made certain. That they were unliquidated did not render them contingent. The contingency, default in payment of rent—had happened. After that the damages were a mere matter of calculation.

The vacation of the premises on July 31st by the receiver, did not, it was stipulated, affect the rights of the parties.

We have had no sufficient reason presented to our attention why the appellant should not recover as his damages against the bank the rent that was reserved by the terms of the lease (during the time that the bank occupied the premises), from and after July 31, 1893, when the receiver surrendered the premises so far as he was concerned, until May 1, 1894, when appellant re-let them and therefore reverse the judgment of the court below as to the bank, and enter judgment here for the sum of \$9,000 against the said appellee, the Chemical National Bank of Chicago, but affirm the judgment as to Eli C. Tourtelot, the receiver.

John Angus et al. v. Backus, Thornton & Co.

1. *COURTS—Power Over Records After the Term.*—A court has no power, after the lapse of the term at which an appeal was dismissed, to amend, or add to the record by or from either affidavits of parties, or its own recollection of what occurred.

Order dismissing an appeal from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WILKES, Judge, presiding. Submitted at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

ELLIS S. CHESBROUGH, attorney for appellants.

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MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This cause was begun before a justice of the peace; judgment being there had against the defendants, they appealed to the Circuit Court; in that court on the 29th day of May, 1894, being at the May term, the record shows that the cause being called for trial, and the defendants failing to prosecute their appeal, the said appeal was dismissed.

Thereafter, on the 29th day of September, 1894, being at the September term of said court, the defendants appeared and moved to set aside the said dismissal; and then and there made to appear to said court, certain matters on account of which it is contended that said appeal was improperly dismissed. The Circuit Court refusing to set aside said dismissal, the defendants obtained, and have set forth in a bill of exceptions made on the 19th day of October, 1894, the matters and things presented to the court at the hearing of said motion to set aside such dismissal. Unfortunately for the contention of appellants, the Circuit Court had no power after the lapse of the term at which the appeal was dismissed, to amend or add to its record by or from either the affidavits of parties or its own recollection of what occurred during the May term. That term, the July and August terms, had passed, ere, by a bill of exceptions, first asked for at the September term and actually made at the October term, the court attempted to add to the record of this cause. It had then, as we have said, no power from recollection or affidavits to change its record.

The record of this cause presents no sufficient reason for setting aside the order of dismissal and final judgment entered at the May term. The refusal of the Circuit Court to set aside such dismissal is therefore affirmed.

**John B. French, Impleaded with James W. Curtiss, as
Surviving Partners of French & Perryman,
v. James W. Regan.**

1. **SERVICE OF SUMMONS**—*Ten Days Before the Term.*—The statute requires service to be made ten days before the first day of the term, in order to compel a defendant to plead.

Assumpsit.—Error to the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard at the March term, 1895. Reversed and remanded. Opinion filed April 4, 1895.

CONSIDER H. WILLETT, attorney for plaintiff in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The plaintiff here was defendant below, served with process six days before the July term, 1894, and a judgment by default entered against him at that term. The judgment was premature. The statute requires service to be ten days before the term, to compel the defendant to plead at that term. Sec. 8, Practice Act.

The judgment is reversed and the cause remanded.

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**Edward Conlon, a Minor, by his Next Friend, v. Loren
Bailey and Ebenezer Saunders.**

1. **NEGLIGENCE**—*In What it Consists.*—There can be no negligence without the failure to observe some duty. In law a person can be negligent only toward him to whom he owes a duty.

2. **INFANTS**—*Excused from Using Due Care—Duty Toward.*—While infancy excuses a person from the exercise of reasonable care, it does not increase the duty of third persons to him.

3. **SAME**—*Injuries to, When Trespassing.*—An infant five years of age, without notice to the driver, climbed on a step on the rear of an ice wagon which was being driven along a public street. A large block of ice slid out, fell upon and severely injured him. *Held*, as the owners of the wagon owed no duty to him they were not liable.

Trespass on the Case, for personal injuries. Error to the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

KING & GROSS, attorneys for plaintiff in error; ANDREW J. HIRSCHL, of counsel.

W. E. HUGHES, attorney for defendants in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The defendants in error owned an ice wagon which was being driven along a public street. The plaintiff in error, between four and five years of age, climbed upon a step on the rear of the wagon, and a large block of ice slid out, falling on, and severely injuring him. Had the boards at the end of the wagon been higher, the ice would not have slid out. Had the boy not been upon the step, he would not have been injured as he was. Admit that the defendants in error were negligent in securing the ice, yet they were negligent only toward those to whom they owed a duty. "There can be no negligence without the failure to observe some duty." *Chi. & West. Ind. R. R. v. Booth*, 35 Ill. App. 349. Had the block fallen upon one crossing the street, or walking behind the wagon, the duty so to use the street as not to injure others using it, would raise a question not in this case. And it is no answer to say that the boy might have been injured when on the street behind the wagon, as severely as when on the step.

The fact is that he was not on the street, and only omniscience can tell where he would have been if not on the step.

Being on the step without notice to the driver, the defendants in error were only under obligations of "general humanity," "not wantonly or carelessly to be an aggressor" toward him. *West Chicago Street R. R. v. Binder*, 51 Ill. App. 420; *Chicago West Div. Ry. v. Hair*, 5419, March 5, 1895.

The infancy of the plaintiff in error would excuse him from the exercise of any care. *Chicago City Ry. v. Wilcox* 33 Ill. App. 450; affirmed, 133 Ill. 370.

Booth v. Gaither.

But such infancy creates no duty of defendants in error. C. & W. I. R. R. v. Roath, 35 Ill. App. 349; Chi. Con. Bottling Co. v. McGinnis, 51 Ill. App. 325.

This suit is by the plaintiff in error to recover damages for the injury he sustained. The Circuit Court instructed the jury to find for the defendants, which was right, and the judgment is affirmed.

Ballington Booth v. Charles A. Gaither.

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176	19

1. *COSTS—In Chancery—Relief Impracticable—Bill Dismissed at Defendant's Costs.*—Where a complainant in chancery had a good cause when he filed his bill, but at the time of the hearing the relief prayed for had become impracticable, the bill should be dismissed at the defendant's costs, under Sec. 18, Ch. 33, R. S., entitled "Costs."

2. *INJUNCTIONS—Use of Advertising Spaces Protected.*—The fact that a person is occupying a store room of a one-story building, does not give him the right to control the space on the front, above the top of the ceiling joists, so as to prevent his lessor from leasing such space to another person for advertising purposes. The right to such space is a property right, and the owner may grant the use of it to another, who will be entitled to protection by injunction in his use of the same.

Bill for Injunction.—Error to the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1895. Reversed and remanded, with directions. Opinion filed April 4, 1895.

CHARLES E. POPE, attorney for plaintiff in error.

THORNTON & CHANCELLOR, attorneys for defendant in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT. January 30, 1893, the plaintiff in error, as commander of the Salvation Army, became the lessee for a term to commence February 15, 1893, and running until September 1, 1894, of premises consisting of an auditorium and hall lead-

ing thereto from West Madison street. The lease did not include one-story stores standing on the front of the same lots that the auditorium stood upon. One of these stores was occupied by the defendant in error, and, as his answer admits, under the same source of title that the plaintiff in error claims under.

Above the stores on the street front, was a blank space of wall built of varying heights; being, over the store of the defendant in error, at the highest point nine feet, and at the lowest point five feet four inches higher than the ceiling of the store.

February 15, 1893, the lessor of the plaintiff in error granted to him for one year, the use of the space above all the stores for advertising the object and purpose of the army.

The plaintiff in error proceeded to paint upon one end of the space, the figures and words "926 Salvation Army Citadel," and was proceeding to paint upon the other end, which was over the store of the defendant in error, the words and figures "And Men's Training Garrison 932," when the defendant in error prevented further progress.

The plaintiff in error filed this bill to enjoin the defendant in error from so preventing.

A preliminary injunction was granted, but upon the hearing, the bill was dismissed for want of equity at the costs of the plaintiff in error, and leave given to the defendant in error to file a suggestion of damages, which he did, and there proceedings below stop.

Before the hearing, the defendant in error had left the premises, and the leases of both parties have now expired, so that there is nothing at stake but the costs, and possibly damages under the suggestion. Yet, if the plaintiff in error had a good cause when he filed his bill, and relief had at the time of the hearing become impracticable or useless, by reason of the defendant in error leaving the premises, while the dismissal of the bill might have been harmless, still it should have been done at the cost of the defendant in error under Sec. 18, Ch. 33, "Costs." So the question now is, had the plaintiff in error a good case when he filed his bill?

Hosher v. Hestermann.

That the space on the front, above the ceilings, or at least above the top of the ceiling joists, of the width of which there is in the record no evidence, remained in the possession of the landlord, is settled in *Payne v. Irwin*, 44 Ill. App. 105; S. C., 144 Ill. 482.

Without assuming uncommon ignorance (*Fisher v. Jansen*, 30 Ill. App. 91, affirmed 128 Ill. 549), we can not suppose the tops of the joists were more than a foot above the ceiling, which would leave a wide space, to which the defendant in error could make no claim.

Being a property right it follows that the landlord could grant the use of that space to another, who would be entitled to protection of such use, by injunction. *Willoughby v. Lawrence*, 116 Ill. 11.

The decree is wrong. It should have been one declaring that the equities were with the complainant at the time the bill was filed, but that he could now have no relief, because the defendant has ceased to be in a position to molest the complainant.

The decree is therefore reversed and the cause remanded, with directions to set aside the order granting leave to file a suggestion of damages, and enter a decree dismissing the bill at defendant's cost in accordance with this opinion. Reversed and remanded with directions.

George Hosher v. Herman F. Hestermann.

1. *LEASE—Description by Street Numbers—What is Not Included.*—The rule that a demise of premises by street numbers includes stables on the rear end of the lot, is not applicable to corner lots in the business portion of a city occupying frontage on two streets, and on which are situated dwellings and business houses, separate and distinct, fronting upon the different streets.

2. *SAME—Of Premises by Street Numbers—What Passes.*—A description of demised premises in a lease of a building, by the street number, includes so much of the lot upon which the building is situated, as is necessary to the complete enjoyment of the building for the purpose for which it was let, and nothing more.

Forcible Detainer.—Appeal from the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

ALLAN C. STORY, attorney for appellant.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant was the owner of a lot situated on the northwest corner of South Desplaines and Quincy streets in Chicago, having a frontage or width of thirty feet on South Desplaines street, and running west, of the same width, one hundred feet along and fronting upon Quincy street.

Upon the lot there were located three buildings; one, a two-story frame structure used as a saloon, fronting and opening upon South Desplaines street and known as No. 161 South Desplaines street; another, an old frame structure, formerly used and known as a blacksmith shop, but then unoccupied, facing south upon Quincy street, and standing west of, and separated by a few feet from the rear of the saloon building, and spoken of as No. 87 Quincy street; and the other, a frame cottage, in which appellant lived, situated west of and separated by a few feet from the shop, and fronting south upon Quincy street, and known as No. 89 that street.

Such being the situation of the property, the appellant and appellee, on November 23, 1891, entered into a contract of lease, whereby the appellant demised and leased unto the appellee for a term beginning on that day and terminating on April 30, 1895, wherein the demised premises are described as "the premises known as No. 161 South Desplaines street, being the northwest corner of Quincy and Desplaines street."

On November 26, 1891, the appellee entered into possession under the lease, of the saloon building, known and numbered as 161 South Desplaines street, and, as he testified of the shop. The appellee testified concerning what he took possession of, and the circumstances under which he took possession, as follows:

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"I moved my stuff in and took possession of the out-house and put my horse in there, and fixed up a stall in there for the horse and kept him in there for four months. It was an old blacksmith shop before, but for four years it had not been occupied, and Mr. Hosher (appellant) told me *when I came there* that I could fix it up and put a stall in there and use it for a barn."

The appellant admitted that appellee had permission to use the shop, but not under the lease, and that it was not until about a month and a half after he had taken possession of the saloon that he took possession of the shop.

About the middle of March, 1892, the appellant nailed up the door to the shop and excluded the appellee from it, and appellee refused thereafter to pay rent. An action for forcible detainer resulted in a judgment in the Circuit Court for appellee, and this appeal is from that judgment.

Unless either by the express terms, or by reasonable construction, of the lease, the shop was included, the judgment was wrong.

We think that taking the testimony of the appellee already quoted as correctly stating the facts and circumstances under which appellee took possession and occupied the shop, it is apparent that he took possession of it under a verbal permission by appellant given subsequent to the execution of the lease, and not under the lease itself, so that there can be no question here of a contemporaneous construction by the parties themselves of any ambiguity in the terms of the lease. The question then must be determined from the lease itself whether the shop constituted a part of the demised premises.

It has been held that a demise of premises by street numbers of residences which form the main or principal feature of the lease, included and carried stables situated on the rear end of the lots on which the residence stood. *Armstrong v. Crilly*, 51 Ill. App. 504; same case, 152 Ill. 646.

But we do not regard such a rule as applicable to a corner lot in the business portion of a large city, occupying a considerable frontage on two streets and occupied by both

business and dwelling houses separate and distinct from each other, and fronting and opening upon different streets. In such a case the rule stated in *Patterson v. Graham*, 140 Ill. 531, is better adapted, that all that can be claimed is "that by construction the lease carried so much of the lot on which the building stood as was necessary to the complete enjoyment of the building for the purpose for which it was rented," and nothing more.

The blacksmith shop had never before been used in connection with the saloon, either as a shop or a stable, and it does not at all follow that while, as in the case of *Armstrong v. Crilly*, *supra*, stables are natural and ordinary adjuncts to a certain class of residences, they are such to a saloon in the business portion of a large city.

The judgment of the Circuit Court will be reversed, and the cause remanded.

Reversed and remanded.

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60	278
58	268
60	63
58	268
70	139

M. T. Paterson v. F. A. Higgins.

1. CHATTEL MORTGAGES.—*For Purchase Money*.—Section 24, Ch. 95, R. S., entitled "Mortgages," providing that no chattel mortgage executed by a married man or woman on household goods, shall be valid unless joined in by the husband or wife, has no application to a mortgage to secure the purchase money of the goods upon which it is given.

2. ALTERATION OF INSTRUMENTS.—*Without the Knowledge of the Owner*.—An alteration of a promissory note, made without the knowledge of the holder, does not destroy its validity.

Bill to Foreclose a Chattel Mortgage.—Error to the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in that court at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

BRIEF OF PLAINTIFF IN ERROR, EDGAR BRONSON TOLMAN,
ATTORNEY.

No chattel mortgage executed by a married man on household goods shall be valid unless joined in by the husband or wife, as the case may be. R. S. Ill., Chap. 95, Sec. 24.

Paterson v. Higgins.

This section has been decided to be constitutional in *Gaines v. Williams*, 146 Ill. 450, and also to apply to household property which constituted the furnishings of a hotel. *Gaines v. Williams*, *supra*.

On the general question of the constitutionality of this section as affected by section 13, article 4, Constitution, see *O'Leary v. Cook County*, 28 Ill. 534; *Dennehy v. City*, 120 Ill. 638; *Larned v. Tiernan*, 110 Ill. 177; *Blake v. People*, 109 Ill. 504; *People v. Brislin*, 80 Ill. 433; *Town of Abington v. Cabeen*, 106 Ill. 200; *Unity v. Burrage*, 103 U. S. 447.

Any material alteration of a note, made by the holder without the maker's consent, destroys the identity of the note and avoids it. If the alteration be with a fraudulent intent, it avoids the note and also cancels the indebtedness. *Wyman v. Yeomans*, 84 Ill. 403; *Burnell v. Orr*, 84 Ill. 465; *Pallman v. Taylor*, 75 Ill. 634; *Benedict v. Miner*, 58 Ill. 19; *Gardner v. Harback*, 21 Ill. 129; *Walton Plow Co. v. Campbell*, 52 N. W. Rep. 883; 35 Neb. 173; *Taylor v. Moore*, 20 S. W. Rep. 53 (Texas); *Vigle v. Ripper*, 34 Ill. 110; *First National Bank of Springfield v. Ryan*, 31 Ill. App. 271; *Elliott v. Blair*, 47 Ill. 342; *Wallace v. Wallace*, 8 Ill. App. 69-72.

Such material and fraudulent alteration of a note also bars the foreclosure of mortgages given to secure it. *Walton Plow Co. v. Campbell*, 52 N. W. Rep. 884.

A fraudulent intent is conclusively presumed when the effect of the alteration is to increase the liability or burden of the maker. *Black v. Bowman*, 15 Ill. App. 166; *Warder, Bushnell & Glessner Co. v. Willyard*, 49 N. W. Rep. 300; *Russell v. Reed*, 36 Minn. 376.

BRIEF OF DEFENDANT IN ERROR, H. L. WILLIAMS, ATTORNEY.

Where the alteration is made by a stranger and with no fraudulent purpose or intent, it will not render the instrument void. *Condict v. Flower*, 106 Ill. 105; *Bledsoe v. Graves*, *ante*; *Rose Clare Lead Company v. Madden*, 54 Ill. 260.

Where a salesman, who has no general authority to make settlements or take notes, or collect on account, is directed

by his employer to take the note of such debtors for the amount of their account, a material alteration in the note by him, before he delivers it to his employers, without their knowledge and not ratified by them, is the act of a stranger, and the note is enforceable against the maker in its original form. An agent who transacts the business of the principal is not clothed with the authority to destroy the property of the principal, or to violate a rule of public policy. *Kingan v. Silvers*, 37 N. E. Rep. 413; *Nickerson v. Sweat*, 135 Mass. 514; *Gleason v. Hamilton*, 138 N. Y. 353; *Hunt v. Gray*, 35 N. J. Law, 227; *Yaeger v. Musgrave*, 28 W. Va. 90; *Bigelow v. Stilphen*, 28 Vt. 531.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The plaintiff in error purchased the household goods contained in a boarding house, paying \$1,100 down and giving her notes for \$1,200, secured by a chattel mortgage upon the property sold to her; she being at the time a married woman living separate and apart from her husband.

Two of the notes she paid as they respectively matured; default having been made in the payment of another, a bill to foreclose the mortgage was brought by the vendor and holder of the notes, Mrs. Higgins.

The defense made to this bill was, first, that the chattel mortgage was invalid because of the statute, section 24, chapter 95, which reads as follows: "No chattel mortgage executed by a married man or woman on household goods shall be valid unless joined in by the husband or wife, as the case may be."

This statute has no application to such a case as the present. The purchase, by sale to the mortgagor, and the giving of a chattel mortgage thereon by her, was one transaction. Only by virtue of the sale and mortgage did the goods become the property of the mortgagor. Plaintiff in error can not claim the benefit of the preceding arrangement by which she obtained the goods, and in the same breath repudiate the mortgage, without the giving of which she would never have had any title to this property.

The rule in respect to purchase money mortgages upon real estate is applicable here. Such mortgages being simultaneous with the deed of purchase take precedence over dower and homestead rights as well as over judgments then existing against the mortgagor. Jones on Mortgages, Sec. 464.

The other defense set up against the bill was that the notes had been changed after their execution so as to make them draw seven instead of six per cent interest. Whether such change was made before or after the execution of the notes, is in dispute; it is, however, manifest, as the court found, that the change was made without the procurement or knowledge of the mortgagee, the holder of the notes.

There was not only no evidence of any fraudulent intent in making the change, but all presumption of fraud is removed by the testimony, which shows that, as before stated, the holder of the notes had neither part nor lot in such change. The court below allowed interest only at the rate of six per cent per annum, which was in accordance with the testimony of the plaintiff in error. Counsel for plaintiff in error argue that the alteration having been made by the agent of the complainant, it must be presumed to have been done by her; citing the maxim "*Qui facit per alium facit per se.*"

We do not think that it is to be presumed, in the face of the evidence to the contrary, that the party who made this change was authorized so to do by the defendant. Certainly there can be no presumption that an agent is authorized to make a fraudulent alteration of commercial paper. Nor is it entirely clear that in drawing up the notes and mortgages the party who was employed merely to negotiate a sale, was acting as an agent of the defendant in error. It was the business of the mortgagor to prepare the notes and mortgage she was to give; the work of preparing such mortgage would seem to have been done for the plaintiff in error rather than the defendant.

The alteration, according to the testimony of plaintiff and defendant in error, was made without authority or knowledge of either.

It would seem that the complainant understood that the agreement was to give notes drawing interest at seven per cent, and when she received such, had no reason for thinking that they were not as executed. The decree was not rendered until long after all the notes had become due, and therefore properly included all of the paper given.

We find no sufficient reason for interfering with the decree of the Superior Court and it is affirmed.

William H. Parsons et al. v. Hatton-Snowden Company et al.

1. *CORPORATIONS—Appropriation of Funds by its Officers, etc.*—The fact that the president of a corporation received, as a part of the consideration for the sale of its property, a note, the proceeds of which, when paid, he used to pay a debt of the corporation upon which he was personally liable, is not such an appropriation of its funds as amounts to a fraud upon other creditors.

2. *PREFERENCES—Stockholders and Preferred Creditors.*—The fact that a preferred creditor of a corporation is a stockholder, does not of itself make the preference unlawful.

Creditor's Bill.—Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 4, 1895.

JOHN J. McCLELLAN, attorney for appellants.

PERCY L. SHUMAN, attorney for appellee Lizzie Hatton, executrix.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This bill is filed against the appellee company and several individuals by creditors of the company.

The ground upon which it is now sought to reverse the decree dismissing the bill is narrowed to this:

That in June, 1887, the company sold its property, and that on that sale Frank Hatton, who was president of the company, received as part of the consideration, a note for

Addyston Pipe & Steel Co. v. City of Chicago.

\$15,700, which was afterward paid, and appropriated it to his own use, on the pretense that the company was indebted to him in that amount; and that such appropriation was an unlawful preference by Hatton to himself, fraudulent as to other creditors under the doctrine of *Beach v. Miller*, 130 Ill. 162; *Roseboom v. Whittaker*, 132 Ill. 31, and *Atwater v. American Exchange Nat. Bk.*, 152 Ill. 605; *Gottlieb v. Miller*, Oct. 29, 1894, Ill. S. C. All that is proved in the case is that the note was used to pay a debt of the company, on which Hatton was personally liable.

The appellants offer neither authority nor argument that such an appropriation is a fraud upon other creditors of the company. The effect of holding it to be a fraud would be that creditors of the company, to whom directors were personally liable, would be in a worse condition than those who were creditors of the company only, though such directors were wholly insolvent. It has been held that the fact that the preferred creditor was a stockholder did not make the preference unlawful. *Reichwald v. Commercial Hotel Co.*, 206 Ill. 439. A creditor secured by any sort of collateral should be in no worse condition.

If he obtained payment without resort to the collateral, and that was property of the company, equity would deal with it as the case might require. The decree is affirmed.

Addyston Pipe and Steel Company v. City of Chicago,
H. J. Jones, Comptroller of the City of Chicago,
M. J. Bransfield, Treasurer of the
City of Chicago.

1. **CREDITOR'S BILL—Does Not Lie Against a Municipality.**—A creditor's bill does not lie against a municipal corporation having in its possession money due to a contractor, for the purpose of subjecting such money to the payment of his debts.

Creditor's Bill.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Submitted at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

JOHN T. BARKER, attorney for appellant.

BYRON BOYDEN, attorney for appellees; JOHN MAYO PALMER, corporation counsel.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a proceeding in chancery instituted by the appellant herein to reach, by a creditor's bill, certain funds in the hands of the city of Chicago due to Michael J. Joice, and apply them to the satisfaction of a judgment appellant had recovered against him; the judgment being for labor and material (certain water pipe) furnished Joice, and used by him under a contract he had entered into with the city.

A general demurrer to the amended bill was interposed by the co-defendants, the city of Chicago, its comptroller and its treasurer, and was sustained and the bill dismissed, the bill having been dismissed as to the principal defendant on motion of the complainant. The bill was properly dismissed.

The principles laid down in *Merwin v. Chicago*, 45 Ill. 133, are as applicable to proceedings against municipalities by creditor's bills as by garnishment.

The judgment of the Superior Court will be affirmed.

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67 114

E. O. Brown, A. W. Brown, W. E. Brown, B. R. Lewis
and W. O. Finkbine, Partners as Rhinelander
Kindling Co., v. The H. W. Boies Co.

1. APPELLATE COURT PRACTICE—*Assignment of Errors*.—No errors having been assigned the court can not review the judgment of the court below. Reasons filed in the court below as grounds for a new trial do not obviate the necessity of an assignment of errors.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Submitted at the March term, 1895. Dismissed. Opinion filed April 4, 1895.

HUGH MCINDOE and WM. T. PAYNE, attorneys for appellants.

I. C. R. R. Co. v. Campbell.

ULLMANN & HACKER, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal can not be considered. No errors have been assigned on the record, and the omission has been insisted upon by the appellee as a reason for our not considering the cause, as would be our duty if errors were assigned.

This court can not review judgments except for errors committed below, and assigned here. Reasons filed below for a new trial do not obviate the necessity of an assignment of errors.

For the argument, we refer to *Lang v. Max*, 50 Ill. App. 465, and in addition to the cases there cited, we add: *Griswold v. Hicks*, 132 Ill. 492; *Mansfield v. Allison*, 16 Ill. App. 31; *Bogue-Badenock Co. v. Boyden*, 33 Ill. App. 252; *Mallers v. Marine Bank Co.* (No. 5558 this term). The appeal will be dismissed at appellants' costs.

Illinois Central Railroad Company v. James R. Campbell.

1. **AMENDMENTS—*Statute of Limitations.***—An additional count filed as an amendment to the declaration, which is only another way of stating the plaintiff's cause of action, is not within the statute requiring the suit to be brought within two years.

2. **NEGLIGENCE—*A Question for the Jury.***—Whether a railroad company has been guilty of negligence in allowing a pile of ashes to remain upon its track, is a question for the jury.

Trespass on the Case.—Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

APPELLANT'S BRIEF, SIDNEY F. ANDREWS, ATTORNEY; JAMES FENTRESS, OF COUNSEL.

The court erred in sustaining plaintiff's demurrer to defendant's plea of the statute of limitations pleaded by it to

58	275
62	269
56	275
105	92
58	275
72	25
170	163

the additional counts filed by plaintiff. *Jackson v. Spittall*, L. R. 5, C. P. 552; *Blake v. Menkner* (Ind.), 36 N. E. Rep. 246; *R. R. Co. v. Cobb*, 64 Ill. 140; *Phelps v. I. C.*, 94 Ill. 549; *Monka v. N. C. Rolling Mill Co.*, 107 Ill. 340; *C. & A. R. R. Co. v. Henneberry*, 38 N. E. Rep. 1044.

APPELLEE'S BRIEF, EDWARD R. WOODLE, ATTORNEY.

The evidence in this case was not conflicting and the verdict can not be set aside as being against the weight of the evidence. *East v. Crowe*, 70 Ill. 91; *Cudahy v. Powell*, 35 App. 29; *Goodman v. Boyd*, 44 App. 247; *N. Chi. St. Ry. Co. v. Lotz*, 44 App. 77.

The questions whether the railroad company was negligent, and whether the plaintiff in the court below was free from negligence, were for the jury to determine. *C. & E. I. R. R. Co. v. Hines*, 132 Ill. 161; *Flynn v. W. St. L. & P. Ry. Co.*, 18 App. 253; *Southerland v. North Pac. R. R. Co.*, 53 Fed. Rep. 646; *Babcock v. Old Colony R. R. Co.*, 150 Mass. 467; *Meek v. N. Y. C. & H. R. R. Co.*, 69 Hun 488; *Horan v. C., St. P. M. & O. Ry. Co. (Ia.)*, 56 N. W. Rep. 507; *Huddleston v. Lowell Machine Shops*, 106 Mass. 282; *So. Pac. Ry. Co. v. Markey*, 19 S. W. Rep. 292; *Mo. Pac. R. R. Co. v. Jones*, 41 A. & E. R. R. Cas. 363; *Snow v. Housatonic R. R. Co.*, 8 Allen 441; *K. C., Ft. S. & G. R. R. Co. v. Kier*, 41 Kan. 661; *St. L. & S. F. Ry. Co. v. Doyle*, 25 S. W. Rep. 461.

The plea of the statute of limitations to the new counts was bad on demurrer, because it did not aver that the cause of action stated in either of those counts was not the same cause of action stated in the original declaration. But if not bad on that account, and the question whether the cause of action in the new counts is the same cause of action as that stated in the original declaration is one for the court to determine on an inspection of the whole declaration, then it appears that the cause of action thus newly stated was the same cause of action originally declared upon. *Parker v. Enslow*, 102 Ill. 272; *T. W. & W. Ry. Co. v. Beggs*, 85 Ill. 80; *Stearns v. Reidy*, 33 Ill. App. 256; *C. & A. R. R. Co. v. Henneberry*, 42 Ill. App. 126; *Blanchard v.*

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L. S. & M. S. Ry. Co., 126 Ill. 416; C. & N. W. Ry. Co. v. Traves, 17 Ill. 136; N. C. Rolling Mill Co. v. Monka, 106 Ill. 340; Haynie v. C. & A. R. R. Co., 9 App. 105; Pa. R. R. Co. v. Sloan, 125 Ill. 72; L. S. & M. S. R. R. Co. v. Hessions, 150 Ill. 546; Smith v. Taggert, 21 App. 538; Tex. & Pac. Ry. Co. v. Cox, 145 U. S. 593; Smith v. Mo. Pac. R. R. Co., 5 C. C. A. 557; S. C., 50 Fed.; Ala. G. S. R. R. Co. v. Chapman, 83 Ala. 453; Case v. Blood, 71 Ia. 632; Nash v. Chatt. & St. L. R. R. Co. v. Foster, 10 Lea 351; Sanger v. Newton, 134 Mass. 308; McDonald v. C. & N. W. Ry. Co., 26 Ia. 124; Davis v. Smith, 14 How. Pr. 187; Dana v. McClure, 39 Vt. 197; C., St. L. & P. R. R. Co. v. Bills, 118 Ind. 221; Smith v. Bogenschutz, 19 S. W. Rep. (Ky.) 667; Colley v. Gate City Coffin Co., 18 S. E. Rep. (Ga.) 817; Ala. G. S. R. R. Co. v. Thomas, 89 Ala. 294; Greer v. L. & N. R. R. Co., 94 Ky. 169.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is a case in which the court must rest upon the rule that the jury determines the facts.

The appellee was a switchman in the service of the appellant, working in a yard of several tracks, and in the night of May 5, 1891, his foot was caught in an unblocked frog and he lost his foot and a part of the fingers of his right hand.

The original declaration, filed June 24, 1892, went only upon the charge that an unblocked frog was a danger to which a switchman ought not to be exposed; but on the trial that ground of action was abandoned, as the appellee knew the construction.

March 3, 1894, an additional count was filed, and April 20, 1894, another, both of which alleged that the appellant wrongfully permitted a pile of cinders and like material to be and remain near to the frog, the appellee being unaware of the pile, and that he stumbled upon it, and his foot was thereby thrown into the frog.

To these counts the appellant pleaded that the cause of action did not accrue within two years next before they were filed, to which plea a demurrer was sustained, and

rightly, for they were but another way of telling the original story. *Stearns v. Reidy*, 133 Ill. App. 246.

If the pile was there, nothing in the case explains how it got there further than that such piles came from cleaning out fires and ash-pans of engines. Nor is there any evidence of how long it had been there, except the testimony of the appellee that it was cold, and his testimony, corroborated by other that such a pile, in the absence of any water upon it, will smoulder twelve to eighteen hours.

Whether the pile was there, and if there its condition, was testified to only by the appellee.

Now, assuming that such a pile was there, and had been there during the whole or the larger part of the working hours of the previous day, and that its presence increased the perils of a service—switching in the night—necessarily dangerous, it was a question for the jury whether the appellant was negligent. And passing the question of pleading, the real question is whether an instruction offered by the appellant that the appellee was not entitled to recover should have been given. Eleven instructions for the appellee, and ten unmodified and four modified for the appellant were given. Six asked by the appellant were refused.

To go over all that the appellant urges upon the subject of instructions would take too much space, and we must briefly state that in our judgment no error of law is in the record, and the judgment is affirmed.

Hugh Hardy v. The Chicago, Milwaukee & St. Paul Railroad Company.

1. *PRACTICE—Exceptions on Appeal Which Were Not Grounds for a New Trial.*—Error can not be assigned upon the improper admission or rejection of evidence, where the motion for a new trial did not specify any such grounds.

2. *RAILROAD COMPANIES—Not Responsible for the Acts of Policemen.*—The mere fact that a policeman is commissioned at the request of a railroad company for guarding its property and paid by it, does not render the company responsible for all his acts.

Hardy v. C., M. & St. P. R. R. Co.

Trespass for False Imprisonment.—In the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Declaration in trespass; plea of not guilty; trial by jury; verdict, not guilty, and judgment for defendant; appeal by plaintiff. Heard in this court at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

JOHN V. A. WEAVER and EDGAR L. JAYNE, attorneys for appellant.

CHARLES B. KEELER and J. R. DICKINSON, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant brought an action against the appellee for a false arrest and imprisonment, and upon a trial of the cause the jury returned a verdict of not guilty, upon which verdict a judgment for the defendant was entered. The appellant was arrested in the yards of the appellee by a special police officer in the employ and pay of the appellee. The nominal offense of appellant, and which caused his arrest, was picking up and sacking potatoes that had been thrown out of the cars and were lying on the track, preparatory to carrying them away, without the permission of an employe of the appellee, named Purcell, who had charge of such matters in the yards.

Purcell, it seems, had the right, or was, at least, accustomed to sell the refuse potatoes that were thrown from the cars, and on the day previous to the arrest had sold some to the appellant and his brother, and had furnished them with sacks to carry away the potatoes.

On the day in question appellant and his brother had returned to the yards with the sacks furnished to them by Purcell the day before, and, not seeing Purcell, had proceeded to pick up potatoes openly, as if they were licensed to do so. When the sacks were about full the appellant left his brother and went, as he testifies, in search of Purcell, to pay him for them, but did not find him.

While he was gone his brother was arrested by the special policeman and taken to the office of the appellee, and

when appellant returned to the place where the sacks were, he also was arrested and taken to the appellee's office. From there the appellant with his brother were taken to the Desplaines street police station in charge of police officers who had been summoned for that purpose, and was there "booked" upon the complaint and charge of stealing potatoes, by the officer who made the arrest, and confined in a cell.

We pass over all questions that have been argued upon the errors assigned of improper admission and rejection of evidence, for the reason that the motion for a new trial that was filed did not specify any such grounds. *Hintz v. Graupner*, 138 Ill. 156; *Clause v. Bullock Co.*, 20 Ill. App. 113; *Hoffman v. World's Columbian Exposition* (No. 5241, this term). See also *Ill. C. R. R. Co. v. O'Keefe*, 39 N. E. Rep. 906.

The errors in instructions, barely alluded to in appellant's brief, are not well taken. There was evidence tending to show that the plaintiff was guilty of larceny, and if it be conceded that the instructions complained of might be construed to contain that element, it was justified by the evidence.

The special policeman, although testifying that he was "told to arrest anybody I (he) found picking up stuff there," did not disclose who so instructed him, nor was it proved by any other evidence. The mere fact that he was commissioned as a policeman at the request of appellee for the guarding of its property and was paid by appellee, did not render the appellee responsible for all his acts. And the same may be said of Lyons, who, it was shown, was the superior in authority to the policeman, in directing that the appellant be taken to the police station.

As to whether the appellee was responsible for the acts committed against the appellant the verdict of the jury was in the negative, and ought not to be interfered with for anything we discover in the record.

No substantial error being made to appear, the judgment will be affirmed.

Agnes Grunenberg v. Robert B. Smith.

1. **CHANCERY PRACTICE—No Replication—Answer Taken as True.**—In the absence of a replication the answer must be taken as true.

2. **SAME—Admissions of One Defendant Do Not Bind a Co-defendant.**—Admissions made by one defendant in her answer, although made in the name of an alleged firm, do not conclude a co-defendant, even when such defendants are partners.

3. **ADMISSIONS—By Partners.**—Partners being agents for each other, the admissions of one in relating to the affairs of the partnership are receivable as evidence against the other partners. Such admissions are, however, only evidence; they do not preclude a denial of the truth.

Bill to Foreclose a Chattel Mortgage.—Error to the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1895. Reversed and bill dismissed. Opinion filed April 4, 1895.

STATEMENT OF THE CASE.

The original bill in this case was filed to enjoin the police of the city of Chicago and the defendant, Grunenberg, and her solicitor, from interfering with the defendant in error in the foreclosure of a chattel mortgage. A preliminary injunction was granted.

The defendant in error thereafter amended his bill, asking the foreclosure of the chattel mortgage by the court and an order for the sheriff to take possession of the property.

Grunenberg, and one Catherine Caplain were alleged to have been at the time of the execution of the mortgage, doing a partnership business at No. 451 West Madison street, consisting of the retail sale of umbrellas, lamp shades, and various articles of merchandise. The defendant in error, it is alleged, loaned to them jointly, various sums of money, aggregating more than \$1,500, for which notes were given by Catherine Caplain in the name of the firm, and the mortgage referred to was made in the same way.

Catherine Caplain filed in the name of the alleged firm of Grunenberg & Caplain, an answer verified by her, in

which is admitted all the allegations of the bill. Agnes Grunenberg filed her answer denying nearly all the material allegations of the bill and asserting that quite a portion of the articles covered by the chattel mortgage were the personal and separate effects of her, the said plaintiff in error.

The answer contains also allegations which, if true, preclude the possibility of relief being, as against plaintiff in error, granted to the complainant. This answer was verified by plaintiff in error.

The cause having been set down for hearing on bill and answer, the court found for the complainant and gave to him a decree in accordance with the prayer of his bill.

M. SALOMON, attorney for plaintiff in error.

THOMPSON, HAWES & McCASLIN, attorneys for defendant in error.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

No replication having been filed, the cause having been set down for hearing on bill and answer, so far as the rights of the plaintiff in error are concerned, her answer must be taken as true.

The admissions made by Catherine Caplain in the answer by her filed, although made in the name of the alleged firm, can not conclude her co-defendant.

Partners being agents for each other, the admissions of one in matters relating to the affairs of the partnership are receivable as evidence against the other partners. Such admissions are, however, only evidence; they do not preclude a denial of their truth. Even if the admission of Miss Caplain made in her answer would be under other circumstances treated as evidence against her co-defendant, in the hearing had by agreement on bill and answer, such admissions were not to be considered in passing upon the rights of the plaintiff in error. As to her, only the statements in the bill and her answer were before the chancellor.

Fender v. Kelly.

The fact that Miss Caplain filed her answer in the name of the firm added nothing to it. It was Miss Caplain's answer and nothing more. Collier on Partnership, Secs. 707, 720, 775; Reese v. Darby, 4 Scammon 159; Gregg v. Renfrew, 24 Ill. 620; Winkler v. Winkler, 40 Ill. 179; Bressler v. McCune, 56 Ill. 475.

The suit was a proceeding against the individuals who were alleged to have been partners. Plaintiff in error, therefore, properly prosecutes the suit in error in her name only.

The decree of the Circuit Court as to Agnes Grunenberg is reversed and the bill here dismissed as to the plaintiff in error, Agnes Grunenberg.

Reversed and bill dismissed as to plaintiff in error.

John W. Fender v. Michael Kelly.

1. **SERVICES—*Rendered Without Employment.***—One party can not be held liable to another party, with whom he has had no dealings, and of whom he has had no notice, for services for which he contracted to pay another and different party.

Assumpsit, for work, labor and services. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

HOLDEN & BUZZELL and CHARLES R. HOLDEN, attorneys for appellant.

REMY & MANN, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This case was tried without a jury, and the only question is whether the court was right in deciding that there were no relations between these parties, growing out of two written contracts hereinafter copied, there being nothing but those contracts for the appellant to charge appellee upon. The contracts are as follows:

“ This agreement made and entered into this 7th day of October, A. D. 1889, by and between Michael Kelly of Danville, Illinois, of the first part, and H. H. Shufeldt & Company, of the second part, witnesseth :

That said first party agrees to supply said second party from October 7, A. D. 1889, to September 30, A. D. 1890, inclusive, such quantities of Kelly Creek lump coal and Kelly Creek lump screenings, as said second party may from time to time designate and require, the said coal to be delivered by said first party at said second party's distillery, at the corner of Larrabee street and Hawthorne avenue, or at their rectifying house at the corner of Cass and Kinzie streets, in Chicago, Illinois, at either or both of said places as second party shall direct.

Said first party further agrees that he will, without further compensation than the price hereinafter agreed to be paid for the coal and screenings aforesaid, haul away daily from said distillery and from said rectifying house, all ashes and refuse resulting from the burning of all coal and screenings furnished by said party.

In consideration of the foregoing undertakings of the party of the first part, the party of the second part hereby agrees to take Kelly Creek lump coal and Kelly Creek lump screenings, as hereinbefore provided, from October 7, A. D. 1889, to and including September 30, A. D. 1890, except that during four weeks of said time, of which notice shall be given, said second party reserve the privilege of buying coal from other parties in order to test the same.

Said second party agrees to pay to said first party monthly for all coal and screenings taken from said first party, at the rate of two dollars and five cents (\$2.05) per ton of 2,000 pounds of Kelly Creek lump coal delivered, and at the rate of one dollar and five cents (\$1.05) per ton of \$2,000 pounds of Kelly Creek lump screenings from lump over one inch screen.

It is further agreed by and between the parties hereto, that in case said second party shall at any time during the term covered by this contract, decide to burn oil or coke,

Fender v. Kelly.

with or without coal or screenings, then this contract shall, upon notice thereof from said second to said first party, cease and terminate, except as to so much, if any, of the coal or screenings aforesaid, as shall be by said second party required of said first party thereafter, under the terms and for the prices fixed by this contract.

It is understood and agreed that the coal and screenings herein contracted for, are for use and consumption at the aforesaid distillery and rectifying house of said second party, and if not furnished and delivered as aforesaid according to the terms of this contract and the requirements of said second party thereunder, then said first party shall be liable to said second party for all damages and loss of profits said second party shall sustain by the cessation of their business, at either said distillery or said rectifying house, or both, by reason of the non-delivery of said required coal and screenings under this contract.

MICHAEL KELLY,
HENRY H. SHUFELDT & Co."

"This agreement, entered into and made this 18th day of October, 1889, by and between Michael Kelly, city of Danville, State of Illinois, party of the first part, and Stephen A. McMahon, of the city of Chicago and State of Illinois, party of the second part, witnesseth :

Said Michael Kelly, party of the first part, hereby agrees to furnish to the said Stephen A. McMahon, party of the second part, delivered in the city of Chicago, State of Illinois, on the Chicago and Eastern Illinois Railway tracks at 12th street in said city, all the Kelly lump coal and Kelly lump screenings that may be needed and used by the H. H. Shufeldt Distilling Company in the prosecution of their business as distillers, for the term of one year, beginning October 7, 1889, and ending September 30, 1890, at the following prices, for the year and time above mentioned : Kelly lump coal, at \$1.65 per ton; Kelly lump screenings, at \$0.65 per ton; and should the said Michael Kelly at any time fail to deliver at the place and tracks above mentioned, the quality of lump coal and lump screenings in such quantities as the said H. H. Shufeldt Distilling Company

should need to fully carry on and prosecute their business, then the said Stephen A. McMahon, party of the second part, shall be entitled to have the privilege to make purchases of such quantities of lump coal and lump screenings as may be needed to keep the works of said H. H. Shufeldt Distilling Company in active operation, and the difference paid (should there be any difference) between the price of the said Kelly lump coal and Kelly lump screenings, so paid, shall be borne by the said party of the first part. This contract being a supplementary contract to a contract made by and between the H. H. Shufeldt Distilling Company, party of the first part, and Michael Kelly, party of the second part. The terms of payment are provided for, wherein the said Michael Kelly shall receive his money at a stated time each month, and on receipt of said money, shall remit to Stephen A. McMahon all money due him for the preceding month, the said money or amount of money due him being the difference between the price made said Stephen A. McMahon at \$1.65 per ton for Kelly lump coal and \$0.65 per ton for Kelly lump screenings, \$2.05 per ton for Kelly lump coal, and \$1.05 per ton for Kelly lump screenings. The above being the price made H. H. Shufeldt Distilling Company by the said Stephen A. McMahon, party of the second part, in this supplementary contract.

The said Stephen A. McMahon, party of the second part, agrees to furnish at all times all the facilities for transportation for said Kelly lump coal and Kelly lump screenings from the Chicago and Eastern Illinois railway tracks at 12th street, to the H. H. Shufeldt Distilling Company's place of business at Chicago avenue and Larrabee street, and to keep them fully supplied at all times in such quantities as they may need, provided the said Michael Kelly has made shipment at proper times, and arranged for the receipt of said lump and screenings at the place and tracks above mentioned.

Signed: MICHAEL KELLY,
S. A. MCMAHON.

FRANK FORRESTER,
Witness."

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It may be assumed, as appellant claims, that McMahon employed Fender to haul the coal and ashes, as Kelly was required to do by his contract with Shufeldt & Co., and also employed Fender at \$2 per day to watch the cars to prevent stealing, on account of all of which service there is now due to Fender \$766.95. Has he any claim upon Kelly for that sum? The appellant relies upon *Burton v. Goodspeed*, 69 Ill. 237, between which case and this, there is some delusive resemblance. It was there held, under a contract between *Burton Bros. & Co.* and *Holbrook*, by which *Holbrook* was to receive upon a dock, and pay charges upon, and then handle and sell coal supplied by *Burton Bros. & Co.*, and being repaid charges paid, was to have a commission fixed for handling and selling, and was to guarantee payment on all sales; that *Holbrook* was an agent, authorized to make for *Burton Bros. & Co.* an executory contract with *Goodspeed & Co.*, for the sale of coal, to be delivered at any time within the next ten months. Yet to make that case applicable to this, *Burton Bros. & Co.* should have been sued, and held liable for labor in handling and selling coal after it was on the dock.

It would not become us to criticise that decision, but it can not be so strained as to justify holding Kelly liable to a party with whom he had no dealings, and of whom he had no notice, for services for which he had contracted to pay McMahon. Whether Kelly has paid McMahon does not appear, and whether he has or not, does not affect the construction of these contracts.

If the appellant's construction be right, then, though McMahon had received his money month by month from Kelly, still Kelly would be liable to pay again to Fender, until the statute of limitations barred the demand.

We hold that McMahon had no authority to pledge the credit of Kelly, and the judgment is affirmed.

58 288
162 511

Charles L. Currier v. George W. Kretzinger et al.

1. **FINDINGS OF THE TRIAL COURT—When Final.**—On a bill for an accounting, the question as to what was a fair allowance to one of the parties for his time and expenses while employed about the business, was for the trial court upon the evidence, and its decision is final.

2. **INTEREST—On Money Received.**—Under Sec. 2, Ch. 74, R. S., entitled "Interest," it is proper to allow interest on money received to the use of another and retained without the owner's knowledge.

Bill for an Accounting.—Error to the Circuit Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

DENT & WHITMAN, with L. S. HODGES, attorneys for plaintiff in error.

TENNEY, McCONNELL & COFFEEN, attorneys for defendants in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

These parties made this agreement:

"Memorandum of agreement, made and entered into between C. L. Currier, party of the first part, and G. W. & J. T. Kretzinger, parties of the second part, witnesseth:

Whereas, some time in the month of July, 1885, said parties hereto obtained for sale certain ranch properties, which they then and there agreed to unite and co-operate with each other in attempting to procure the sale thereof, in the London market, and thereafter to that end, said first party entered into certain contracts with Hass and Haley, and with George W. McCrary, and made certain advances to pay the expenses of J. T. Kretzinger, one of the parties of the second part, to London, to negotiate the sale of said properties, and agree to make such further advances as may be necessary in the premises.

And whereas, said parties hereto and each of them have assisted and rendered various services, and contributed all possible aid they or either of them could render in seeking to promote and consummate said sales, and agree to continue their efforts in this behalf.

Currier v. Kretzinger.

And whereas, the parties hereto desire to form themselves into a syndicate for the purpose of securing mining and ranch properties, and farming and other lands for sale, intending to include all kinds of property, both real and personal, that are salable in the market in London or elsewhere.

Therefore, in consideration of the premises, and for the purpose of defining the interest of the parties hereto in the proceeds that may come to them, or either of them, or the profits that may be realized from said sale, or the sale or sales of any property made by either of them, it is agreed that all the proceeds or profits realized from the sale or sales of any of such properties that have heretofore been negotiated, made and consummated, or that may hereafter be negotiated, made or consummated, said first party shall receive one-third and the second party two-thirds thereof.

This contract shall include any moneys, stock or other consideration heretofore paid or agreed to be paid, or that may hereafter be received by either party to this contract, in consideration of any aid rendered by either party to this contract in negotiating or consummating such sale.

This contract is to continue with full force and effect for one year from and after date hereof.

It is further agreed and understood that after the first proceeds have been received as above contemplated and provided, the said first party shall contribute one-third of the expenses and the said second party two-thirds of the expenses, and that either party hereto who may be absent from the city of Chicago attending to the business contemplated by this agreement, shall receive a reasonable compensation for such time so employed.

Witness the hands and seals of the parties hereto this tenth (10th) day of April, A. D. 1886.

CHARLES L. CURRIER, [SEAL.]

G. W. & J. T. KRETZINGER, [SEAL.]

The within contract is hereby extended one year from April 10, 1887.

G. W. & J. T. KRETZINGER.

CHARLES L. CURRIER."

Thereafter Joseph T. Kretzinger was a party to this agreement:

"LAW OFFICE OF HODGES & SHIPPEN, 59 PORTLAND BLOCK,
CHICAGO, Sept. 26, 1887.

We, the undersigned, enter into the following agreement together, to-wit: C. L. Currier and A. C. Reed hereby agree to endeavor to secure a loan for Harvey Wells, of Wellston, O., and if they are successful we hereby agree to divide equally between L. S. Hodges, J. T. Kretzinger, C. L. Currier and A. C. Reed the sum of twenty-five thousand dollars, and C. L. Currier and A. C. Reed shall be entitled to keep for themselves any bonus of lands or other properties that they may be able to secure in this transaction over and above this twenty-five thousand dollars.

CHAS. L. CURRIER.

A. C. REED.

L. S. HODGES.

J. T. KRETZINGER."

The negotiation contemplated by this last agreement was so successful that the plaintiff in error received under it \$12,500, and Joseph T. Kretzinger \$5,000.

The defendants in error filed this bill to compel, and have a decree that the plaintiff in error pay to them the excess which he has retained over one-third of these two sums, less such sum as should be allowed to him for expenses and compensation for his time when absent from Chicago attending to the business. That sum has been fixed below at \$1,250. The \$25,000 which the second agreement implies would be received as commissions on the loan for Wells, was at last only \$20,000, and the extra \$7,500 which Currier obtained, was in stock, which he sold to Reed for that sum and did not report it to the Kretzingers.

Standing only on those agreements it is clear that Joseph T. Kretzinger could have no claim upon Currier for any part of what the latter agreement calls "a bonus;" and, therefore, whatever might be the rights of George W. Kretzinger against Currier, they could not be enforced under a bill in which both Kretzingers were complainants.

Currier v. Kretzinger.

The brief of the plaintiff in error says:

“ MAY IT PLEASE THE COURT :

The controlling question in this case is, are the parties to this controversy governed in their relations to the ‘ Wells-ton transaction ’ by the contract of April 10, 1886, or that of September 26, 1887? ”

The Kretzingers both testified that from the making of the second agreement at Hodges’ office, Currier and Joseph T. Kretzinger went to the office of the Kretzingers, and it was then not so much agreed as explicitly stated, that the second agreement had no reference to or effect upon, the relations of these parties; and Joseph T. Kretzinger further testified that the first agreement was intentionally by him and Currier, kept from the knowledge of Reed and Hodges. Reed testified that Currier asked him not to mention the “ bonus ” to Kretzingers, Currier thinking possibly he might be called upon to divide it under the original contract.

The testimony of Currier, in opposition to what I have recited, still leaves the preponderance of evidence with the defendants in error and supports the finding of the Circuit Court in their favor upon the question quoted from the brief. Some complaint is made of fraud, as the brief calls it, upon Hodges, in concealing from him the division Currier was to make of the “ bonus. ” How Hodges could be injured by anything that Currier chose to do with what, as between Currier and Hodges, was the property of Currier only, does not appear. Whether \$1,250 was a fair allowance to the defendant in error for his time and expenses was a question upon the evidence upon which the decision of the Circuit Court is final. Upon the amount found to be due to the Kretzingers from Currier, the court allowed interest at five per cent from the time Currier received the \$7,500, which is in accordance with Sec. 2, Ch. 74, “ Interest, ” allowing interest “ on money received to the use of another and retained without the owner’s knowledge. ”

There is no error and the decree is affirmed.

J. Rayner, a Corporation, v. John B. Rees and James Rees, Partners as Rees Brothers.

1. *WARRANTY—Implied—When it Does Not Exist.*—When goods are purchased upon inspection and selected by the vendee, there can be no implied warranty.

Assumpsit, for goods sold and delivered. In the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Trial by jury; verdict and judgment for plaintiff; appeal by plaintiff. Heard in this court at the March term, 1895. Reversed and remanded. Opinion filed April 4, 1895.

STATEMENT OF THE CASE.

J. Rayner, a corporation, dealing in mahogany, rosewood, veneer and fancy cabinet woods, sold lumber and veneer, extending over a long period of time, to the Rees brothers, who were manufacturers.

The last sale to them by J. Rayner was made October 2, 1893; the last payment by Rees Brothers to J. Rayner was made by note, dated November 29, 1893, leaving a balance due J. Rayner of two hundred and thirty-seven dollars and six cents (\$237.06), which the Rees Brothers refused to pay, claiming that a portion of a certain log of mahogany lumber, delivered July 15, 1893, was defective; and also claiming an overcharge of one cent a foot on certain bills of one quarter inch mahogany.

J. Rayner filed a declaration in *assumpsit*, with common counts, to which defendants pleaded the general issue.

The trial resulted in a verdict for the plaintiff, J. Rayner, for \$117.50, on which verdict the court, after overruling a motion for a new trial on behalf of the plaintiff, entered judgment.

Appellant has brought the record into this court and asks for a reversal of that judgment for the reasons set forth in the assignment of errors.

JOHN J. KELLY, attorney for appellant.

Chicago Fire Place Co. v. Tait.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Under the evidence in this case the defendant was not entitled to any deduction from the purchase price of the lumber because of defects therein. There was no express warranty of quality; the lumber was selected by the defendant and purchased upon inspection; in such case there is no implied warranty. *Luetgert v. Volker*, 54 Ill. App. 287.

There is a dispute among the witnesses as to whether the defendant should have been charged for the quarter inch mahogany, eight or nine cents a foot. Giving to the defendant the benefit of this and the verdict will remain clearly too small by a substantial sum.

The judgment is therefore reversed and the cause remanded.

Chicago Fire Place Company (Intervening Petitioner) v.
J. Selwin Tait, United States Book Company,
George M. Trowbridge, Receiver.

1. **INSOLVENCY**—*Does Not Discharge a Corporation*.—Insolvency does not discharge a corporation from its liabilities existing at the time a receiver is appointed nor from those accruing thereafter.

2. **TRUSTEES**—*No Implied Power to Create Liens*.—A trustee of whatever character, be he trustee of an express trust, executor, administrator, guardian, assignee in insolvency, or receiver, has no implied power to charge or create a lien upon the assets in his hands, unless under some very exceptional circumstances. If, therefore, anything is done by him which creates a liability at all, it must generally be against himself.

3. **LANDLORD AND TENANT**—*Insolvent Tenant—Receiver—Liability for Rent*.—A corporation in possession of premises under a lease, became insolvent and was placed in the hands of a receiver, who continued to occupy the premises under the lease for a period less than the term and then left with a notice to the landlord that he would pay no more rent. The landlord not being able to procure other tenants for a portion of the unexpired term petitioned the court appointing the receiver for relief, but was denied. *Held*, on error, that he was entitled, as a claim upon the assets, to be paid *pro rata* with other creditors, the rent for which at the time of such allowance, the insolvent might be liable, according to the terms of the lease.

58	203
67	226
58	293
78	504

Claim for Rent.—Insolvent corporation; receiver. Error to the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1895. Reversed and remanded with directions. Opinion filed April 4, 1895.

BRIEF OF PLAINTIFF IN ERROR, GANNON & AGNEW, ATTORNEYS.

If the assignee enters upon the demised premises, or does any other act which is equivalent, to signify his assent to accept the term as the assignee of the lease, he will become the tenant of the premises and render himself liable for the rent. *Thomas v. Pemberton*, 7 Taunt. 205; *Clark v. Hume*, 1 Ryan & Moody 206; *Hanson v. Stevenson*, 1 Barn. & Al. 303; *Woodruff v. Erie Ry. Co.*, 93 N. Y. 624; *Com. v. Franklin Insurance Co.*, 115 Mass. 278.

BRIEF OF DEFENDANTS IN ERROR, MASON BROTHERS AND WILLIAM C. ARNOLD, ATTORNEYS; HENRY E.

MASON, OF COUNSEL.

The assignee will not be held to have accepted the lease unless it be shown that he has done so expressly, or by unequivocal acts, inconsistent with the right of entry by the landlord, has indicated an election to appropriate the leasehold estate. *Smith v. Goodman*, 149 Ill. 81.

The receiver being an officer of the court and acting under the court's direction and instructions, his powers are derived from and defined by the court under which he acts. He is not such a general agent as to have any implied power, and his authority to make expenditures and incur liabilities must be either found in the order of his appointment or be approved by the court before they acquire validity and have any binding force upon the trust. *Chicago Deposit Vault Company v. McNulta*, 153 U. S. 561.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The United States Book Company was tenant of the plaintiff in error under a lease to expire April 30, 1897.

In January, 1893, under a bill filed by Tait, alleging that the book company was insolvent, a receiver of its assets was

Chicago Fire Place Co. v. Tait.

appointed, who occupied and paid the rent of the demised premises to the end of March, 1894, then leaving them, with notice to the plaintiff in error that he would pay no more rent.

April 27, 1894, the plaintiff in error filed a petition asking for such relief as it might be entitled to, and on the hearing of that petition it appeared that the plaintiff in error, up to some uncertain later date, had not been able to get any rent for the premises, from any source.

November 27, 1894, the court dismissed the petition, and the plaintiff in error sued out this writ.

The insolvency of the book company did not discharge it from its liabilities existing at the time the receiver was appointed, nor from such as might thereafter accrue. The rent being \$250 per month, payable monthly in advance, there was eight months' rent due when the petition was dismissed, for the whole of which the plaintiff in error could have maintained an action against the book company, unless some disposition of the premises, not shown by this record, had been made. For whatever the book company could have been made liable in an action, a claim against the assets should have been allowed.

The question elaborately argued by counsel, of acceptance of the lease by the receiver, has nothing to do with this case. If the receiver be liable, it is only in an action at law, and the liability of the book company is wholly independent of any act of the receiver.

In fact, a trustee of whatever character, be he trustee of an express trust, executor, administrator, guardian, assignee in insolvency or receiver, has no implied power to charge, or create a lien upon the assets in his hands, unless under some very exceptional circumstances. *Sperry v. Fanning*, 80 Ill. 371; *Johnson v. Leman*, 30 Ill. App. 370; 131 Ill. 609; *Goodman v. Lee*, 40 Ill. App. 229; *Smith v. Goodman*, 43 Ill. App. 530.

If, therefore, anything done by him creates a liability at all, it must generally be against himself. The difference between this court and the Supreme Court, in *Smith v.*

Goodman, 43 Ill. App. 530, 149 Ill. 75, was that we regarded Mrs. Smith's petition as one for a preferred claim, or nothing; while the Supreme Court held that under it she might come in as a general creditor.

It is only as a general creditor that the plaintiff in error here asks to come upon the assets, and to that extent the decision of the Supreme Court in Smith v. Goodman is authority in its favor.

The judgment is reversed and the cause remanded, with directions to allow to the plaintiff in error, as a claim upon the assets to be paid *pro rata* with other creditors, the rent for which at the time of such allowance the book company may be liable, according to the terms of the lease, and if the premises have been relet, then to allow damages as is pointed out in the opinion of the Supreme Court in Smith v. Goodman.

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James A. Cunningham v. Max H. Alexander and Samuel Tausig, for the use of First National Bank of Chicago.

1. **PRACTICE**—*Damages in Excess of the Ad Damnum*.—Where the damages are in excess of the amount claimed in the declaration, the objection must be made in the court below; it can not be urged for the first time in the Appellate Court.

2. **SAME**—*Estoppel to Object in the Appellate Court*.—A trial was had before a judge of the Superior Court, but before he rendered his decision he was transferred to the Appellate Court, and the parties stipulated that it might be tried before another judge, upon the transcript of the evidence taken before the former judge. On appeal it was objected that there was no bill of exceptions showing that the transcript of the evidence read before the judge who tried the case was a correct transcript of the evidence heard by the former judge. *Held*, that as the transcript was treated by the parties on the trial before the latter as the one heard by the former and as the one referred to in the stipulation, it was too late to make the objection.

Assumpsit.—Breach of contract. In the Superior Court of Cook County; the Hon. THEODORE BRÉNTANO, Judge, presiding. Trial by the court; finding and judgment for plaintiff; error by defendant. Heard in this court at the October term, 1894. Affirmed. Opinion filed April 4, 1895.

Cunningham v. Alexander.

WM. ARMSTRONG and W. B. WILSON, attorneys for plaintiff in error.

MOSES, PAM & KENNEDY, attorneys for defendants in error.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The damages awarded in this cause being in excess of the *ad damnum* of the declaration, it is insisted that for this reason the judgment must be reversed. No such objection was made in the court below; it therefore can not be urged in this court. Had it been presented in the Superior Court, it could easily have been obviated by amendment. *Utter v. Jaffray*, 15 Ill. App. 236; 114 Ill. 470.

The case was first tried before his Honor, Judge Gary, without a jury, but Judge Gary having been transferred to the Appellate Court before the case was decided, it became necessary to submit the matter to another judge. The matter thus came before his Honor, Judge Brentano.

A stipulation was entered into, signed by counsel on both sides, that on the hearing before Judge Brentano the transcript of the evidence taken before Judge Gary should be read in evidence, and no other evidence offered.

It is now insisted that no bill of exceptions showing what evidence was heard before Judge Gary was made, and that the evidence given upon the last trial fails to show that the transcript of a stenographer's notes, read before Judge Brentano, was a correct transcript of the evidence heard by Judge Gary. The transcript was read and treated in the trial before Judge Brentano, by each party, as the transcript of the evidence heard before Judge Gary, and as that referred to in the stipulation of the parties, and it is now too late to make this objection.

It is next insisted that the evidence does not sustain the finding. There is force in the suggestion, that, as Judge Brentano did not see or hear any of the witnesses, the finding does not come to us with the presumptions in favor of its

correctness upon disputed questions of fact that ordinarily exists.

We have examined the bill of exceptions here presented, and find no sufficient reason for overruling the finding of the Superior Court upon the questions of fact.

As to the authority of Raymond as agent of the defendant below, to make the guaranty upon which this suit is brought, we think that the conduct of the defendant was such as to indicate that Raymond was authorized to do what he did, at least to induce the plaintiffs below to believe, and act upon the belief, that Raymond had such authority.

The judgment of the Superior Court is affirmed.

Carrie A. Blakey et al. v. Martin Emerich Outfitting Company.

1. **CONTRACTS—Written and Printed Portions—How Construed.**—In case of a conflict between the words written into a printed blank and the printed part of the same, the written part will prevail, but interpretation will reconcile them if, reasonably, it can be done.

2. **TRUST DEED—What is Not a Breach of the Condition.**—A person made three notes due in forty-nine, seventy-nine and one hundred and nine days, and secured the same by chattel mortgage. The first note being paid, he executed a trust deed in the nature of a mortgage providing that the two first should be extended thirty days from maturity, and that no foreclosure of the chattel mortgage should be made during such extension. The first note as extended was not paid when due and the holder foreclosed the chattel mortgage before the extension of the second note had expired. It was held that such foreclosure was not a breach of the condition of the trust deed so as to defeat his remedy on it as a security.

Bill to Foreclose a Trust Deed.—Error to the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

KRAFT, WILLIAMS & KRAFT, attorneys for plaintiffs in error.

Blakey v. Emerich Outfitting Co.

SLEEPER, BARBOUR & EMERICH, attorneys for defendant in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The plaintiffs in error executed to the defendant in error three promissory notes becoming due in forty-nine, seventy-nine and one hundred and nine days from April 27, 1893, and secured the same by a chattel mortgage.

June 22, 1893, the first note not being paid, the plaintiff in error executed a trust deed in the nature of a mortgage, which deed, reciting the notes and chattel mortgage, provided as follows: "which said two first notes are each here extended for a period of thirty days from their respective dates of maturity. This trust deed is given for collateral security to said notes in addition to said chattel mortgage, and on condition that no foreclosure under said chattel mortgage shall be made during the times of the extensions of said notes, as herein provided." And "if default should be made in the payment of said promissory notes, or any part thereof, or the interest thereon, or any part thereof, at the time and in the manner above specified, for the payment thereof, or in case of waste or non-payment of taxes or assessments thereon, or a breach of any of the covenants or agreements therein contained, then in such case the whole of said principal sum and interest secured by the said promissory notes should thereupon, upon the option of the legal holder thereof, become immediately due and payable, and on the application of such holder it should be lawful for the grantee in said deed mentioned, or a successor in trust, to enter into or upon and take possession of said premises."

The first note as extended was not paid when due, and the defendant in error proceeded under its chattel mortgage, and disposed of the property, before the extension of the second note had expired. This bill was filed May 2, 1894.

The only question in the case is whether, by proceeding on the chattel mortgage before the extension of the second note ran out, the defendant in error broke the condition upon which the trust deed was given, and so lost its remedy upon that security.

The extract first copied from the deed was in the filling of a printed blank which contained the other extract. It is true that in case of a conflict between the words written into a printed blank and the printed part, the written will prevail; still, interpretation will reconcile them if, reasonably, it can be done. Bishop on Contracts, Sec. 413.

Here there is no conflict. Failure to pay the first note as extended, is made a cause for all to become due.

"The manner above specified," as the second extract reads, is with extensions of thirty days from "dates of maturity" on the faces of the notes.

A fair, business-like construction of the provisions, is, that when the first note was not paid when due by the extension, then the whole at once became due; all extensions ceased and all privileges based upon them also ceased. The decree of foreclosure is affirmed.

Heath & Milligan Manufacturing Co. v. Daniel F. Flannery.

1. *CONTRACT—To Pay for Material, etc.—Burden of Proof.*—Where a person agreed in writing to pay for material which another should use in finishing a job, before a recovery can be had, it must be shown that the material was furnished and used in finishing the work.

Assumpsit, for materials furnished. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Submitted at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

MCGLOSSON, BEITLER & MALMIN and JAMES LANE ALLEN, attorneys for appellant.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This cause originated in a justice's court, where the appellant commenced a suit against the appellee to recover the price of certain goods delivered to one George Gregory upon an order signed by the appellee.

Judgment was obtained in the justice's court, and an ap-

Heath & Milligan Mfg. Co. v. Flannery.

peal taken by the defendant, and upon trial (a jury having been waived,) in the Circuit Court, judgment was rendered in favor of the appellee and against the appellant, and this appeal is taken to reverse said judgment.

The order upon which the goods were delivered was as follows:

“CHICAGO, November 25, 1890.

Messrs. Heath & Milligan,

GENTS: George Gregory has a contract to paint two houses at Longwood for Z. Dorion, contractor; the contract is for \$160, on which he has received \$60, and has painted the exterior. If you will present bill for any material he may use in finishing said work, I will see that the amount is held back from the amount of his contract to pay the same. I am attorney for the Masonic Building, Loan and Savings Association.

Very respectfully,

D. F. FLANNERY.”

When the plaintiff received this order, it furnished Gregory with material to the amount of \$78.56, and charged and billed it to appellee, and shipped it to Gregory at Kensington, Illinois, instead of to Longwood, where the houses were.

Those places were on different lines of railroad, and were five or six miles apart, across the country.

Whether any of the material that was furnished under the order was used in finishing the work referred to was not shown, but it was shown that the job referred to was not completed, and that Gregory absconded.

The most that can be claimed of the order given by the appellee is that it was a promise to pay for materials to be furnished to Gregory and used by him in the job. There was a failure to prove that such use of the materials was made. Without reproducing here the letters of Gregory that were read in evidence, it is sufficient to say that they do not sustain the contention of appellant that the material was used on the job.

The judgment of the Circuit Court was, we think, correct, and it will be affirmed.

Samuel E. Gross v. Michael C. Sloan, for use E. W. Blatchford et al.

1. **COURTS—Power to Correct Records.**—A court has power, after the expiration of the term, to correct its record, and to direct the clerk to record a verdict which was returned, and which should have been recorded by the clerk at the time of its rendition.

2. **NEGLIGENCE—Of an Attorney is Negligence of the Client.**—It is the settled rule in this State, that negligence of the attorney appearing in a cause is the negligence of the client.

3. **GARNISHMENT—Issue upon the Answer—When to be Made.**—It is not irregular to permit the making of an issue upon the answer of a garnishee after the term has passed at which the answer was filed.

4. **VERDICTS—When Sufficiently Responsive to the Issue.**—The following verdict, "We, the jury, find the issues for the plaintiff, and assess the plaintiff's damages at the sum of two hundred and seventy-nine and 58-100 dollars," was held sufficiently responsive to the issues presented by the interrogatories, answer and replication in a proceeding by garnishment.

Garnishee Proceedings.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Submitted at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

APPELLANT'S BRIEF, YOUNG, MAKEEL & BRADLEY, ATTORNEYS.

A verdict is bad when the jury fail to find all that was in issue. Thompson on Trials, 2639; Proffat on Jury Trial, 444.

"When a verdict is found, there can be nothing added to it or taken from it; but as it is found, so the court must judge of it, and whatever is found as a verdict, whereupon the court can give any judgment, must be positively found, not ambiguously; for, if the jury doubt, the court can never resolve the matter of fact; and Shower held, that if the jury do find positively the matter of argument, and do not make the conclusion *de facto*, the court shall reject the matter of argument, and give judgment to the contrary." Duncomb on Trials Per Pais, 259.

In *devastavit* two questions are to be found by the verdict; one, whether the assets had been legally administered, and

Gross v. Sloan.

the other, what amount of assets had been wasted. *Young v. Wickliffe*, 7 Dana (37 Ky.) 447.

In an action of debt, it is erroneous to enter judgment upon verdict, finding in favor of plaintiff and assessing a certain sum as his damages. *Jackson v. Haskell*, 2 Scam. 365; *Heyl v. Stepp*, 3 Scam. 94; *Austin v. People*, 11 Ill. 453; *Ross v. Taylor*, 63 Ill. 216; *Bodine v. Swisher*, 66 Ill. 537.

In such cases a general verdict finding in favor of the plaintiff and for a certain amount of money, not specifying whether it is for debt or damages, is not sufficient to base a judgment upon. *Jones v. Lloyd, Breese* (Ill.) 225; *Toles v. Cole*, 11 Ill. 562; *Knox v. Breed*, 12 Ill. 60; *Pulliam v. Pen-
cenneau*, 23 Ill. 92; *Caldwell v. Richmond*, 64 Ill. 31.

Nor will a general finding for the plaintiff in a case of any kind suffice. *Hampton v. Watterson*, 14 La. An. 236; *Broeck v. Wabash & C. R. W. Co.*, 13 Ill. App. 556; *Hirth v. Lynch*, 96 Ill. 409.

A verdict must not be uncertain. *Duncombe on Trials Per Pais*, 259.

APPELLEE'S BRIEF, WEIGLEY, BULKLEY, GRAY & EASTMAN,
ATTORNEYS.

"Where a verdict is good in substance, it is sufficient under the statute of jeofails; it may be regarded as reduced to form." *City of Pekin v. Winkel*, 77 Ill. 56; *Atlantic Ins. Co. v. Wright*, 22 Ill. 462; *Jarrard v. Harper*, 42 Ill. 457; *Wiggins v. City of Chicago*, 68 Ill. 472; *Hartford Ins. Co. v. Van Dooser*, 49 Ill. 489; *Minkhart et al. v. Hankler*, 19 Ill. 47; *Bates v. Williams*, 43 Ill. 494.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION
OF THE COURT.

This case is before this court for the second time. At the March term, 1894, it was remanded, upon the ground that the verdict appearing upon the record was not responsive to the issue presented. *Gross v. Sloan*, 54 Ill. App. 202.

After the decision in this court the appellee discovered, among the files in the court below, a paper signed by the

jurors purporting to be a verdict differing in language from what had been spread upon the record, and moved the trial court to amend the record so as to show the true verdict. This was done against the objection of the appellant, and afterward a judgment was rendered upon the verdict thus recorded.

The inception and progress of this case was, otherwise, as follows :

On September 2, 1887, Almon W. Buckley made affidavit that prior to that time Eliphalet W. Blatchford and Nathaniel H. Blatchford had acquired a judgment against Michael C. Sloan upon which execution had been issued and returned "no property found;" that Mr. Sloan had no property in the knowledge of affiant liable to execution, and that the affiant had reason to believe that Samuel E. Gross was indebted to Mr. Sloan or had effects or estate of Mr. Sloan in his hands.

On September 3, 1887, this affidavit was filed in the Superior Court, and a garnishee summons issued requiring Mr. Gross to answer as to the rights, credits, choses in action, effects, estate, property or money in his hands belonging to Mr. Sloan. The writ was returnable to the October term, A. D. 1887, and was served in due time for that term.

On September 8, 1887, interrogatories directed to Mr. Gross were filed.

On October 7, 1887, being at the October term, a conditional judgment was taken against Mr. Gross and *scire facias* ordered.

On October 15, 1887, *scire facias* was issued returnable to the first Monday of November, 1887, being the first day of the November term.

On October 18, 1887, the *scire facias* was served upon Mr. Gross.

On November 9, 1887, Mr. Gross, by A. S. J. Magruder, his attorney, entered his appearance in the case and filed his answer to the interrogatories, denying any indebtedness to or having in charge, custody, control or possession, any money, right, credit, property or effect of Mr. Sloan, or in which Mr. Sloan was interested.

On December 7, 1887, the third day of the next succeeding, or December term, a replication was filed, alleging that the answers of the defendant to the interrogatories were untrue.

On September 16, 1891, Mr. Magruder, the attorney who had charge of the case for Mr. Gross, died.

On December 6, 1893, the case was called for trial and tried *ex parte*, the plaintiff only being in court, and a verdict and judgment for \$279.58 was rendered against Mr. Gross.

On December 30, 1893, one of the days of the same term, Mr. Gross moved that it be vacated, supporting his motion with an affidavit, showing the death of Mr. Magruder, who had charge of all his legal affairs; that he had no knowledge that this case was pending at the time of Mr. Magruder's death, supposing that it had been disposed of by the answer filed in 1887; that he labored under that belief until he accidentally learned of the entry of the judgment after it was entered, and that at the time of service upon him of the original writ he owed nothing to Mr. Sloan, and had nothing in his possession belonging to Mr. Sloan, or in which Mr. Sloan, to his knowledge, had any interest.

The verdict upon which the judgment now appealed from was rendered, is as follows :

"We the jury, find the issues for the plaintiff and assess the plaintiff's damages at the sum of two hundred and seventy-nine and 58-100 dollars."

It is insisted that the verdict now appearing in the record is not responsive to the issues.

This court having remanded the cause to the Superior Court for such proceedings as to right and justice appertain, that court had power to correct its record and to direct to be entered any verdict which it found to be the verdict rendered by the jury upon the trial. The court did not attempt to correct or amend a verdict. It in this regard merely directed its clerk to record the verdict which was given, and which should have been recorded by the clerk at the time of its rendition. *O'Keefe v. Kellogg*, 15 Ill. 347; *Palmer v. Woods*, 149 Ill. 146.

One of the issues presented by the interrogatories, answer and replication, was whether the appellant had in his possession at the date of the service of the writ upon him, any moneys due to Michael C. Sloan; another was whether appellant was at said date indebted to said Sloan. The verdict seems to be responsive to these, and the assessment of damages seems to be in accordance with the practice in actions of assumpsit.

In the absence of anything showing what the evidence was upon the trial, we do not see how appellant can be heard to complain that the verdict is not responsive to the issues.

It is the settled rule in this State that the negligence of the attorney appearing in a cause, is the negligence of the client. *Yates v. Monroe et al.*, 13 Ill. 219; *Kern v. Strausberger*, 71 Ill. 413; *Clark v. Ewing*, 93 Ill. 572-578.

Appellant's attorney having filed an answer, could easily, as he did, have compelled the garnishing creditor to take issue thereon. Thereafter, appellant was entitled to have the cause tried in due course; that the matter rested for several years without a trial, was not a condition forced upon appellant, any more than the delay of four years was a condition forced upon the garnishing creditor. For aught that appears, the cause was tried as soon as it was reached.

We do not think it is in this State irregular to permit the making of an issue upon the answer of a garnishee, after the term has passed at which such answer is filed. The practice in Alabama is, in this regard, not in accordance with that of Illinois.

The judgment of the Superior Court is affirmed.

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**Ernest V. Johnson, Carl D. Bradley and Elias F. Gobel
v. Sanitary District of Chicago et al.**

1. COURTS OF CHANCERY—*Interference with Boards Charged with the Execution of Public Works.*—It is with reluctance that a court of chancery will interfere with the discretion of a board charged with the execution of a public work and in the awarding of contracts, exercising powers quasi judicial.

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2. **SANITARY DISTRICT—Powers of the Trustees as to Bids.**—The trustees of the sanitary district are, in the nature of things, better qualified to determine what bids should be accepted and what rejected than a court of chancery can be, and it can only interfere where the chancellor can see that the trustees have either acted in violation of law, or in such a manner that its contract virtually amounts to a fraud.

Bill to Compel the Awarding of a Contract.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Submitted at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

BURNHAM & BALDWIN, attorneys for appellants.

APPELLEES' BRIEF, GEORGE E. DAWSON AND CHARLES C. PICKETT, ATTORNEYS.

A mandamus or a mandatory injunction lies to compel the performance of official duties which are purely ministerial, but not those which are discretionary or judicial. High on Extraordinary Remedies, Sec. 92; Tiedeman on Municipal Corporations, Sec. 173; Dillon on Municipal Corporations, Sec. 832; Kelly et al. v. City of Chicago et al., 62 Ill. 279; Ottawa v. People ex rel. Caton, 48 Ill. 233; County of St. Clair v. People ex rel. Keller, 85 Ill. 396; People ex rel. Bull v. Supervisors of La Salle County, 84 Ill. 303.

The awarding of a contract by the trustees to the lowest responsible bidder requires a judicial determination not only of the pecuniary responsibility of the bidders, but also of their judgment, skill, ability, integrity and good faith. Hoole v. Kinkead, 16 Nev. 217; Commonwealth v. Mitchell, 82 Pa. St. 343; High on Extraordinary Legal Remedies (2d Ed.), Sec. 92; People v. Contracting Board, 33 N. Y. 382.

Where the law requires the board to let contracts to the lowest responsible bidders, the powers vested in the trustees are judicial and not ministerial, and in the absence of fraud will not be controlled by the courts. Kelly v. Chicago, 62 Ill. 279; High on Extraordinary Legal Remedies, Sec. 92; Hoole v. Kinkead, 16 Nev. 217; East River Gas Light Co. v. Donnelly, 93 N. Y. 557; Erving v. Mayor, 131 N. Y. 133; State v. McGrath, 91 Mo. 386; State v. Commissioners of

Shelby Co., 36 Ohio 326; Douglas v. Commonwealth, 108 Pa. St. 559; Madison v. Harbor Board of Baltimore, 39 A. & E. Copp. R. 296; People v. Contracting Board, 33 N. Y. 382; People v. Contracting Board, 27 N. Y. 378.

A written proposal by the corporation, a written bid to do the proposed work, a written acceptance of the bid by the corporation, together constitute a contract, wholly in writing, valid and binding on the contractor and on the corporation. Village of Morgan Park v. Gahan (Ill.), 26 N. E. Rep. 1085; Argent v. San Francisco, 16 Cal. 256; Wiles v. Hoss, 114 Ind. 371; Beach on Municipal Corporations, Sec. 1, 104; Dillon on Municipal Corporations, Sec. 450; Chicago Mun. Gas Light Co. v. Town of Lake, 130 Ill. 42; City of Alton v. Mulledy, 21 Ill. 76; People v. Supervisors, 27 Cal. 655.

Fraud is never presumed, but must be proved by clear and cogent evidence, which leaves the mind satisfied that the charge is true. Shinn v. Shinn, 91 Ill. 477; The Aultman & Taylor Co. v. Weis, 34 Ill. App. 615; Kerr on Fraud & Mistake (Ed. of 1882), 382.

Allowing a responsible party to join in a bid submitted by irresponsible parties is a mere matter of grace on the part of the board of trustees, and the refusal thereof can not be charged as fraud or bad faith. People v. Green, 11 Hun 56; People v. Campbell, 72 N. Y. 497; People v. Board of Education, 5 N. Y. Sup. 392.

If the appellant is not entitled to the contract, the writ of mandamus or mandatory injunction does not lie; if he is entitled to the contract he has his action for damages at law. People v. Campbell, 72 N. Y. 497; People v. Board of Education, 5 N. Y. Sup. 392; People v. Green, 11 Hun 56.

The law does not favor litigation which interferes with or delays contracts like the one here in question. Harlev v. Sanitary District, 54 Ill. App. 337; Madison v. Harbor Board of Baltimore, 39 A. & E. Corp. Rep. 296.

Before the court can issue a mandamus or mandatory injunction, the petitioner must show a clear right to such relief from the court. If the right is doubtful, the writ

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of mandamus will not be granted. *People v. Soucy*, 26 App. 505; *People v. Old Town*, 88 Ill. 202; *People v. Crotty*, 93 Ill. 180; *People v. Contracting Board*, 27 N. Y. 378.

Where a contract has already been let, a lower bidder is not entitled to a mandamus or mandatory injunction. *People v. Contracting Board*, 27 N. Y. 378; *Weed, Parsons & Co. v. Beach*, 66 How. 470-476.

WALKER, JUDD & HAWLEY, attorneys for appellees Griffiths and McDermott.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The trustees of the Sanitary District of Chicago having advertised for bids to do certain work, appellants and four others put in bids. Three of the bids having been ruled out, the appellants' bid was \$145,111.06 lower than that of their only remaining rival. The contract having been awarded to such rival, appellants filed a bill to set aside such award, and, in effect, to compel the giving of the contract to them. The court below found against the complainants and they prosecute this appeal.

Various reasons, other than those resting upon the discretion possessed by the trustees in acting upon bids, have been urged by appellees as a sufficient answer to the bill of complaint in this cause.

Passing these by, we prefer to rest our decision affirming the decree of the Circuit Court, upon the reluctance with which a court of chancery will undertake to interfere with the discretion of a board charged with the execution of a public work, and in the awarding of contracts exercising powers quasi judicial.

In the nature of things it must be that the trustees of this sanitary district are better qualified to determine what bids should be accepted, and what rejected, than a court of chancery can be, and it is only when the chancellor can see that the board has either acted in violation of law, or in such a manner that its contract virtually amounts to a fraud, that the court will interfere. *Kelly v. Chicago*, 62 Ill. 279; *Ewing*

v. Mayor, 131 N. Y. 133; East River Gas Light Co. v. Donnelly, 93 N. Y. 55; Douglass v. Commonwealth, 108 Penn. St. 559.

It might be, if we were called upon to answer the question, that we should say that the bid of appellants should have been accepted and the contract awarded to them.

The discretion as to this matter has not been vested in us; it has been confided to trustees of this sanitary district.

We are to consider, not what we, in the exercise of discretion, would have done, but what the board in the exercise of its discretion, did, and to answer, if we are prepared to say that there has been such an abuse of the discretion vested in such board as amounts to a fraud. Nor can we be unmindful of the consequence of setting aside the decision of the trustees, and compelling them to enter into contractual relations with appellants.

While we have no doubt that, under such trying circumstances, the board would faithfully endeavor to discharge its duty, yet human nature is such that it is obvious unpleasant controversies, inimical to the interests of the public as well as to appellants, would be much more likely to arise from a contract thus forced upon the board, than under one by it voluntarily entered into.

It is much better that the complainants should be left to such remedy as a court of law may offer them, than that a court of chancery should, in this case, interfere with the usual course of the business of the great undertaking intrusted to this board.

The judgment of the Circuit Court is affirmed.

GARY, J.

I prefer to put my assent to the affirmance of this decree upon the single ground, that, in practical effect, the relief which the appellants seek is the specific performance of a contract for a succession of acts whose performance can not be consummated by one transaction, a kind of relief which chancery will not give.

I have said all I wish to say upon the matter in *Hawley v. Sanitary District*, 54 Ill. App. 337.

David A. M. Clark et al. v. John A. Logan Mutual Loan and Building Association et al.

1. **MARKET VALUES—Of Lands.**—The market value of land is what it will bring in the open market under fair conditions, reasonable effort to find purchasers being made and reasonable time allowed in which to effect a sale.

2. **RECEIVER—Appointed for a Second Mortgage.**—On a foreclosure proceeding, on a cross-bill by a defendant holding a second mortgage to foreclose the same, the court may, where the circumstances warrant it, appoint a receiver upon the application of the holder of the second mortgage and deny an application for the same on the part of the holder of the first mortgage.

3. **SAME—Stipulation for Appointment of, in Mortgage.**—Where a mortgage contains a stipulation for the appointment of a receiver in case of a default in payment, to collect the rents and profits, the court will enforce the same unless there are good reasons shown why it should not.

Mortgage Foreclosure.—Appeal from an order appointing a receiver, by the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed April 4, 1895.

STATEMENT OF THE CASE.

This appeal is by the mortgagors from an order of the Circuit Court appointing a receiver to collect rents and profits under a cross-bill to foreclose a mortgage.

The application below was based upon two grounds:

First. That the mortgaged premises are inadequate security, and the owner of the equity of redemption is insolvent.

Second. The mortgages of complainant and cross-complainant provide that upon default being made in the payment of the principal, interest, taxes or assessments a receiver may be appointed.

The court below granted the application of the cross-complainant, who holds the second mortgage, for a receiver, and overruled the application of complainant, who holds the first mortgage.

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APPELLANTS' BRIEF, STIRLEN & KING, ATTORNEYS.

The Supreme Court of Massachusetts approved an instruction which informed the jury that market value is not "to be limited to that price which the property would bring when forced off at auction under the hammer." *Lawrence v. Boston*, 119 Mass. 126.

Even an actual sale of personal property, at public vendue, is held to be "only evidence to be considered with other testimony in the case." *Roberts v. Dunn*, 71 Ill. 41.

"The market value is a near and perhaps the closest approximation to the true value." *Dwight v. County Commissioners*, 11 Cush. 201.

In order to authorize the appointment of a receiver upon mortgage foreclosure, to take possession of and collect the rents and profits arising from the mortgaged lands, it must be made to appear :

1. That the value of the mortgaged land is less than the mortgage and superior liens.
2. That the mortgagor or person liable upon the principal indebtedness is insolvent.
3. That the owner of the equity of redemption or person in possession is insolvent. *Haas v. Chicago Building Society*, 89 Ill. 498; *Silverman v. N. W. Mut. L. Ins. Co.*, 5 Brad. 124; 20 Am. & Eng. Enc. of Law, 37.

The appointment of a receiver is a remedy; it is a part of the procedure of courts of chancery to conserve and enforce equitable rights; but not an equity of itself. 20 Am. & Eng. Enc. of Law, 17; *Bispham's Eq. Jur.*, Sec. 36.

Consent of the parties, before the court, will not avail to secure resort to the remedy in a case otherwise improper, or if the rights of other persons will be affected adversely, or put in danger of violation. *Beach on Receivers*, Sec. 54; *High on Receivers*, Sec. 7.

BRIEF OF THE JOHN A. LOGAN MUTUAL LOAN AND BUILDING ASSOCIATION, DUMMER & MALTMAN, ATTORNEYS.

A mortgage which pledges the rents and profits of property as well as the property itself, is a perfectly valid and

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enforceable contract. Freedman's Saving Co. v. Shepherd, 127 U. S. 494; Am. Bridge Co. v. Heidelberg, 94 U. S. 799; Galena, etc., v. Menzies, 26 Ill. 122; Miss. Valley, etc., Co. v. U. S. Ex. Co., 81 Ill. 534; Gilman, etc., v. Ill. & Miss. Tel. Co., 91 U. S. 603.

The validity of the "receiver clause," so called, or its equivalent, has been passed upon directly and specifically by American courts, and so far, it is in every instance upheld. Warner v. Gouverneur's Exrs., 1 Barb. (N. Y.) 36; Whitehead v. Wooten, 43 Miss. 523; Morrison v. Buckner, Hemp. 442; Taylor v. Wabash R. R. Co., 8 Biss. 247; Leeds v. Gifford, 41 N. J. Eq. 464; Haas v. Chicago B. S., 89 Ill. 498; Allen v. Dallas & Wichita R. Co., 3 Woods 316.

DAVID G. ROBERTSON, attorney for appellees.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is quite true that the market value of land is not the price that it would bring at a forced sale; neither is it the sum that people may think the property is worth. The market value of land is what the land would bring in the open market under fair conditions, reasonable effort to find purchasers being made and reasonable time allowed in which to effect a sale. The market value is perhaps best shown by sales of land similar in nature and situation. 14 Am. & Eng. Enc. of Law, 468; Lawrence v. Boston, 119 Mass. 26.

In the present case not only were the rents and profits of the land pledged for the security of the second mortgage, (Oakford v. Robinson, 48 Ill. App. 270), but it appears that the mortgagors are insolvent and the property meager and scant security.

Nearly two years must elapse ere a purchaser, under these foreclosure proceedings, can obtain title to the premises. Not until fifteen months after a sale will the purchaser be entitled to possession. As a consequence a bidder must take into consideration the interest for that time on the money by him paid as well as the taxes that will in the meantime become payable.

It is manifest that no prudent trustee would now, subject to the unpaid taxes, loan upon this property the sum to which the mortgages amount to nor would any court having control of a trust fund sanction such loan. While this is perhaps not in such a matter the best criterion as to the value of the property, it is indicative of the kind of security the holder of the second mortgage has.

It is urged that the affidavits as to the insolvency of the mortgagors are mere hearsay. There was quite conclusive evidence as to insolvency, aside from that presented by the affidavits. The fact of the default in the payment of interest, suffering the land to be sold for taxes, and the existence of three judgments with executions thereon, returned no property found, was, in the absence of any showing by the Clarks of their solvency, amply sufficient. It is not the case that the parties to this cause have, by contract, required or compelled the court to appoint a receiver. The parties made a contract which there is no reason why a court should not enforce. *Hass v. Chicago Building Society*, 89 Ill. 503; *Nichols v. Peninsular Stove Co.*, 48 Ill. App. 317.

It is equitable that the claim of the mortgagees to these premises should be protected, and it would be contrary to equity that the mortgagors should be allowed, after their default, to retain the rents and profits and thus to defeat the mortgagees in their effort to obtain from the premises the payment of what the mortgagors owe.

The order of the Circuit Court is affirmed.

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Fred Limouze v. The People of the State of Illinois.

1. *VARIANCES—Indictment and Proofs.*—A charge for falsely pretending in relation to the price of "certain pieces, parcels and lots of land" is not sustained by proof of false pretenses in relation to but one lot.

Indictment.—Obtaining money by false pretenses. Error to the Criminal Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1895. Reversed and remanded. Opinion filed April 4, 1895.

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C. STUART BEATTIE, attorney for plaintiff in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was indicted for, and convicted of, obtaining money by false pretenses. The indictment charges that the pretense was "that the price of certain pieces, parcels and lots of land that he had purchased for" parties named, was \$1,600, and that he as agent "had paid \$1,600 for the said pieces, parcels and lots of land," while in fact the price "was not \$1,600, nor any sum over and above \$1,300."

The proof is that in the latter part of February or first part of March, 1893, the plaintiff in error and the prosecuting witness looked at a lot, the price of which he told her was \$1,600, and that he could get one for \$1,600; that April 21, 1893, the prosecuting witness gave the defendant in error authority to buy it for \$1,600; that next day he bought it for \$1,300, and charged his principal \$1,600, so that he secretly kept \$300.

The variances between the indictment and proof are substantial. The business had relation but to one lot—not pieces, parcels and lots; and the representation was as to a lot to be bought—not one that had been bought.

Morally, the differences are not great, but they are as fatal as in *Bromley v. People*, 150 Ill. 297, where, upon an indictment charging a burglary in the night time, it was held that a conviction could not be sustained upon proof of a burglary in the day time.

So a charge of giving intoxicating liquor is not sustained by proof of selling. *Humpeler v. People*, 92 Ill. 400.

The motion for a new trial should have been granted. The judgment is reversed and the cause remanded.

Edward Sloncen v. The People of the State of Illinois.

1. CRIMINAL PRACTICE—*Election Not to Further Prosecute—Nolle Prosequi*.—An election by the state's attorney not to further prosecute a count of an indictment, and a statement by him in open court to that effect is equivalent to a *nolle prosequi* as to such count.

2. JURY TRIAL—*Waiver of, in Writing.*—The act of June 17, 1893, "(An act to provide a trial by jury in all cases where a judgment may be satisfied by imprisonment," Laws, 1893, 96,) providing that no person shall be imprisoned for non-payment of a fine or judgment in any civil, criminal, quasi criminal or *qui tam* action, except upon conviction by jury, unless he waives such jury by executing a formal waiver in writing, does not apply to cases where the defendant has been sentenced to imprisonment and no fine or money judgment entered up against him.

3. CONVICTIONS—*Power of the Court to Reverse.*—Where the evidence preserved in the record fails to show that the defendant was guilty of the offense charged, the Appellate Court will reverse the judgment of conviction or error.

Indictment for a Misdemeanor.—Error to the Criminal Court of Cook County: the Hon. JOHN BARTON PAYNE, Judge, presiding. Submitted at the March term, 1895. Reversed and remanded. Opinion filed April 4, 1895.

STATEMENT OF THE CASE.

This is an appeal from a judgment sentencing the appellant to one year in the house of correction.

The first count in the indictment upon which the defendant was arraigned, was for an assault with intent to kill. He was put upon his trial without a jury, the jury having been waived "by oral agreement between the state's attorney and the defendant." Before going to trial the state's attorney elected "not to further prosecute the first count in the indictment." The remaining counts of the indictment charged that "the defendant made an assault upon one David Kelly, with a deadly weapon, with the intent to inflict upon the person of said Kelly, a bodily injury," etc.

After hearing the evidence, the court found the defendant "guilty in manner and form as charged in the indictment," and sentenced the defendant to be confined to the house of correction of the city of Chicago, for and during the term of one year.

JOHN C. KING and JOHN W. BYAM, attorneys for plaintiff in error.

JACOB J. KERN and KNIGHT, WAGNER & KENDIG, attorneys for defendants in error.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The election to and statement by the state's attorney that he would not further prosecute the first count of the indictment, was equivalent to a *nolle prosequi* as to such count. The finding of the court has reference only to the counts remaining.

We do not regard the statute as requiring that in a case of this kind the waiver of trial by jury shall be in writing. The statute provides "That no person shall be imprisoned for non-payment of a fine or a judgment in any civil, criminal, quasi-criminal or *qui tam* action, except upon conviction by jury. Provided, that the defendant or defendants in any such action may waive a jury trial by executing a formal waiver in writing; and provided further, that this provision shall not be construed to apply to fines inflicted for contempt of court. And provided further, that when such waiver of the jury is made, imprisonment may follow judgment of the court without conviction by a jury." Sess. Laws of 1893, p. 96. Plaintiff in error has not been fined nor has any money judgment been rendered against him.

We find ourselves unable to agree with the Criminal Court that the defendant was shown to be guilty of the offense with which he was charged.

There is a wide difference in the testimony as to the affair out of which this prosecution arose. The facts which seem to be beyond dispute are not in harmony with the judgment of the Criminal Court, while the very great preponderance of the evidence upon matters in dispute seems to us to be in favor of the innocence of the defendant below.

It was admitted that the defendant had, up to the time of the occurrence in question, borne a good character and been a good officer. That he should suddenly have developed into a drunken brute, ready to shoot an unoffending citizen is improbable, and we see no sufficient reason for thinking that the eight witnesses who testified that the defendant was sober can all have either been mistaken or willful falsifiers. Unless the defendant was drunk his alleged conduct is incredible.

We are not unmindful of the weight that must be here given to the conclusion of the trial court, and if this case was one in which the evidence seemed to be equally balanced we should not feel warranted in interfering; but the testimony preponderates so greatly in favor of the defendant that we can not do otherwise than reverse the judgment and remand the cause.

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58	489
58	518
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60	473
58	318
67	138

North Chicago Street Railroad Company v. Ann Cheetham.

Same v. Charles Chapin.

West Chicago Street Railroad Company v. George J. Vandehouten.

1. **STREETS—Fee of, in Cities.**—The fee of all streets in Chicago is in the city in trust for the public, but subject, however, to the provisions of paragraph 90, of Sec. 1, Art. 5, Chap. 24, R. S., entitled, "Cities, Villages and Towns."

2. **CITIES AND VILLAGES—Power to Grant the Use of Streets to Railroad Companies.**—A city is without power to grant the use of a public street for railroad purposes, except upon petition of the owners of lands representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for such purposes as required by Par. 90, Sec. 1, Art. 5, Ch. 24, R. S., entitled "Cities, Villages and Towns."

3. **SAME—Requisites of the Petition.**—The statute (Par. 90, Sec. 1, Art. 5, Ch. 24, R. S.) does not require that a petition to the city council to grant the use of, or the right to lay down a railroad track in a street shall be signed by the owners themselves; it is sufficient if it be signed by the agents of such owners, without the authority of such agents appearing on the face of the petition. In the absence of information that the names of such owners were signed without authority, and no fraud being alleged, a petition so signed is sufficient to set in motion the reserved power of the council.

4. **PLEADING—Statement of Conclusions.**—An averment in a bill for an injunction that a city ordinance granting the use of a public street to a railroad company is void for the reason that it was passed without ten days' previous notice having been given as required by law, and for the reason that it was passed without a proper petition asking for its passage, is no more than the statement of a conclusion by the pleader

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without the allegation of any fact to support it. The averment of a reason why an ordinance is void is a mere dodging of the averment of a fact upon which the conclusion that it is void depends.

5. *SAME—Insufficient Averments.*—An allegation in a bill for an injunction to restrain a railroad company from laying its tracks in a public street, that the petition was not signed by the owners, does not overcome the presumption that the council had before it a petition purporting on its face to meet the requirements of the law, and is insufficient.

6. *PLEADING—Allegations to be Construed Against the Pleader.*—The rule that allegations will be most strongly construed against the pleader is applicable, and should be enforced in cases where the validity of an act of a municipal corporation is involved.

7. *CORPORATE ACTS—Lack of Power—Where the Courts Will Not Interfere.*—It is only in cases of a total lack of power that courts will interfere with the acts of bodies charged by law with the discharge of public duties, and then only when the lack of power to do the particular thing complained of is clearly shown.

8. *JUDICIAL NOTICE—Distance Between Streets.*—Courts can not take judicial notice of the distance between the various streets of the city of Chicago.

Bill for Injunction.—In the Circuit Court of Cook County. Consolidated cases; the Hon. RICHARD S. TUTHILL and the Hon. OLIVER H. HORTON, Judges, presiding. Submitted to this court at the March term, 1895. Reversed and remanded. Opinion filed April 5, 1895.

APPELLANT'S BRIEF, EGBERT JAMIESON, ATTORNEY.

Appellant contends that appellee can not invoke the extraordinary remedy of an injunction upon the case made by the bill; the relief, if any, can be obtained only in a court of law. *Patterson v. Chicago, D. & V. R. R. Co.*, 75 Ill. 588; *Tibbitts v. W. & S. Towns St. Ry. Co.*, 54 Ill. App. 187; *Moses v. Kane et al.*, 21 Ill. 515; *Corcoran v. C., M. & N. Ry. Co. et al.*, 149 Ill. 291; *Stetson v. Chicago & Evanston R. R. Co.*, 75 Ill. 74; *C., B. & Q. R. R. Co. v. McGinnis*, 79 Ill. 269; *Truesdale v. Peoria Grape Sugar Co.*, 101 Ill. 564; *Penn Mutual Life Ins. Co. v. Heiss*, 141 Ill. 35; *Parker v. Catholic Bishop*, 146 Ill. 165; *Doane v. Chicago City Railway Co.*, 51 Ill. App. 333; *Sparhawk v. P. R. R. Co.*, 54 Pa. St. 101; 1 *Spelling*, Ex. Relief, Sec. 382.

There is no sufficient allegation in the bill that public notice was not given as required by law. *Northern Electric Ry. Co. v. C., M. & St. P. R. R. Co.*, 57 Ill. 409.

There is no sufficient allegation in the bill that the statutory requirements as to frontage were not complied with. *Northern Electric Ry. Co. v. C., M. & St. P. R. R. Co.*, 57 Ill. App. 409.

BRIEF OF THE WEST CHICAGO STREET RAILROAD COMPANY,
EDMUND FURTHMANN, ATTORNEY.

The fee of Grand avenue is in the city, in trust for the public, and in consequence the public authorities only can enforce public rights or redress public wrongs. *Sparhawk v. Union P. R. Co.*, 54 Pa. St. 401; *Patterson v. C., D. & V. R. Co.*, 75 Ill. 588; 1 Spelling on Extraordinary Relief, Sec. 382; *Hunt v. Chicago Horse & Dummy R. R. Co.*, 121 Ill. 638; *Moses v. Pitts. R. R. Co.*, 21 Ill. 515; *Stetson v. Chi. & Evan. R. R. Co.*, 75 Ill. 74; *Patterson v. Chi. Dan. & Vin. R. R. Co.*, 75 Ill. 588; *Peoria, etc., R. R. Co. v. Schertz*, 84 Ill. 135; *Chi. & E. I. R. R. Co. v. Loeb*, 118 Ill. 203; *Chi. & W. I. R. R. Co. v. Ayres*, 106 Ill. 511; *P. & Ft. Wayne R. R. Co. v. Reich*, 101 Ill. 157; *Chicago & E. I. R. R. Co. v. McAuley*, 121 Ill. 161; *Penn. Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35; *Corcoran v. Chi., M. & N. R. R. Co.*, 149 Ill. 291; *Loire v. N. C. St. Ry. Co.*, 32 Fed. Rep. 270; *People v. Kerr*, 27 N. Y. 188; *Tibbetts v. The W. & S. T. St. Ry. Co.*, 38 N. E. Rep. 664; *Parker v. Catholic Bishop*, 146 Ill. 165; *McDonald v. English*, 85 Ill. 232; *Springer v. Walters*, 139 Ill. 419.

The abutting property owner's right to use the street is no greater than that of every other one of the public, and he can not represent the public and by his individual suit conclude its right. *Doane v. Chicago City Ry. Co.*, 51 Ill. App. 362; *Davis v. Mayer*, 2 Duer 663; *Hartshorn v. South Reading*, 3 Allen 501; *McDonald v. English*, 85 Ill. 232; High on Injunctions, Sec. 762; *City of E. St. Louis v. O'Flynn*, 119 Ill. 200; *City of Chicago v. Union Bldg. Ass'n*, 102 Ill. 379; *Patterson v. C., D. & V. R. R. Co.*, 75 Ill. 588; *Vanderpoel et al. v. The West & S. Towns St. Ry. Co.*, *Chi. Leg. News*, Vol. 26, 388.

The finding of the city council as to the sufficiency of the petition before it at the time of the passage of the ordi-

nance is conclusive unless attacked directly, or for fraud. *Tibbetts v. W. & S. Towns St. Ry. Co.*, 54 Ill. App. 180; *Black on Judgments*, Sec. 532; *Bissell v. City of Jeffersonville*, 24 How. 287; *Vanderpoel v. The W. & S. Towns St. Ry. Co.*, 26 Chi. Leg. News, 238; *Ely v. Board of Commrs. Morgan Co.*, 112 Ind. 361; *Strieb v. Cox, Treas.*, 111 Ind. 299; *People v. City of Rochester*, 21 Barb. 656; *Nash v. Williams*, 20 Wall. 326.

HAMILTON & FULLENWIDER, attorneys for appellee Ann Cheetham.

CHARLES H. CHAPIN and WM. J. MANNING, attorneys for appellees.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

These three cases, involving substantially the same questions, will be considered together, although brought to this court, two upon appeal and the other by writ of error, upon different records.

For convenience' sake we will refer to the appeal cases as the Cheetham and the Chapin cases, respectively, and to the error case as the Vandehouten case.

All the cases were in equity, and were for relief by way of injunction only, against the appellant in the Cheetham and Chapin cases from laying its tracks and putting up poles and electric wires and operating electric cars in certain portions of Fullerton avenue, Chicago; and against the plaintiff in error in the Vandehouten case from laying tracks and constructing and operating a railroad on Grand avenue in said city, between certain specified streets.

In the Cheetham and Chapin cases the complainants were the owners, respectively, of a residence lot abutting upon said Fullerton avenue between the points from and to which said road was threatened to be constructed and operated; and in the Vandehouten case, the complainant was the owner of a residence lot abutting upon said Grand avenue, between

Indiana street and Chicago avenue, along which the plaintiff in error was threatening to construct and operate its railroad.

To each bill a general demurrer was filed and overruled, and the defendant in each cause having elected to stand by its demurrer, the court decreed perpetual injunctions as prayed. From such decrees this appeal and writ of error are prosecuted.

The ordinances of the city of Chicago under which the appellants were, respectively, claiming to act, were set up in the respective bills, and on their face conferred the right to do the acts against which the relief was prayed.

The powers of the city council of cities organized under the act for the incorporation of cities and villages, as finally amended March 30, 1887, of which the city of Chicago is one, are, so far as the questions presented are concerned, contained in Sec. 1, Art. 5, of that act, and are as follows:

Par. 9. To regulate the use of streets.

Par. 24. To permit, regulate or prohibit the locating, constructing or laying a track of any horse railroad in any street.

Par. 90. The city council shall have no power to grant the use of, or the right to lay down, any railroad tracks in any street of the city to any steam, dummy, electric, cable, horse or other railroad company, whether the same shall be incorporated under any general or special law of the State, now or hereafter in force, except upon the petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes, and when the street or part thereof sought to be used shall be more than one mile in extent, no petition of land owners shall be valid unless the same shall be signed by the owners of the land representing more than one-half of the frontage of each mile, and of the fraction of a mile, if any, in excess of the whole miles measuring from the initial point named in such petition, of such street, or of the part thereof sought to be used for railroad purposes.

The fee of all streets in Chicago is in the city, in trust for the public, but subject, however, to the provisions of paragraph 90 aforesaid, and paragraph 90 is a limitation upon the power granted by paragraphs 9 and 24, above. *Hunt v. Chicago Horse & Dummy Ry. Co.*, 121 Ill. 638.

It is apparent from the mere reading of paragraph 90 that the city is without power to grant the use of a public street for the railroad purposes therein mentioned except upon the petition therein provided. The words "shall have no power to grant," etc., are as strong and plain as language is susceptible of; and it is said in *Tibbetts v. Street Ry. Co.*, 153 Ill. 47, the petition referred to is a "prerequisite to the passage of such ordinances," and language to the same effect is used in *Hicky v. C. & W. Ind. R. R. Co.*, 6 Ill. App. 172.

In the Cheetham case, after averring the passage and approval of the ordinance, it is alleged as follows:

"That said ordinance is void for the reason that the said ordinance was passed by said city council without ten days' previous public notice having been given as required by law, in some newspaper of the said city of Chicago, or in said county of Cook, of the time and place of the presenting of the petition of the said street railroad company, or the consent of the council to locate and construct a street railway upon and along said Fullerton avenue, the street in said ordinance mentioned.

Your oratrix further represents unto your honors, that the said ordinance is void for the further reason that it was passed by the said city council, without a petition, asking for the passage of the said ordinance, having been signed by the owners of the land representing more than one-half of the frontage of the street, or so much of said Fullerton avenue as is sought or proposed to be used for such street railway track or tracks as is required by law, and particularly without any petition for the passage of said ordinance having been signed by the owners of the land representing more than one-half of frontage of said Fullerton avenue, along the eastern mile and fraction of a mile, which is proposed and sought to be used for such street railroad tracks, as is re-

quired by law; that the said premises of your oratrix front said Fullerton avenue along the eastern mile of so much of said Fullerton avenue as is sought or proposed to be used for said street railroad track; and that because no such notice was published, and because of the fact that no such petition as aforesaid, as is required by law as aforesaid, was presented to the said city council, said ordinance is void, and said council had no authority to pass such ordinance without such notice as aforesaid having been published, and without such petition having been signed as aforesaid."

The bill in the Chapin case also alleges reasons why the ordinance is void, giving as such reasons substantially the same as are alleged in the Cheetham case, although with increased amplification. There is not in either bill any allegation that the requisite notice was not given, nor that the requisite petition was not signed and presented to the council.

The averments that the ordinance is void for the reason that it was passed without ten days' previous notice having been given as required by law, and for the reason that it was passed without a proper petition asking for its passage, are no more than the statements of a conclusion by the pleader without the allegations of any fact to support it.

There is no allegation in the bill that the requirements of the statute concerning the notice and petition were not complied with, and no traversable issue concerning the same was presented by either bill. The averment of a reason why an ordinance is void is a mere dodging of the averment of a fact upon which the conclusion that it is void depends. There were therefore no allegations in either bill to support the injunctions that were allowed.

If, however, we could treat the averments as allegations of facts regarding the lack of a petition, they would be manifestly insufficient.

It is not to be presumed that a body charged with public duties will proceed in violation of law, and confer grants without the observance of the limitations expressly imposed by statute, and allegations which shall furnish good cause

for interference by courts with such bodies in the exercise of their granted powers, must be clear and explicit, and must point out by positive allegation wherein such bodies have violated the law by exceeding their powers.

The allegation treating the averment of a reason why the ordinance is void as the allegation of a fact prerequisite to its validity, is that the ordinance is void because it was passed without a petition asking therefor, "signed by the owners of the land representing more than one-half of the frontage," etc.

The statute does not require that the petition shall be signed by the owners.

It was expressly decided in *Tibbetts v. Street Ry. Co.*, *supra*, that the petition might be signed by agents of the owners, without the authority to the agents appearing on the petition, and that in the absence of an allegation that the names of the owners were signed without authority, and no fraud being alleged, a petition so signed was sufficient to set in motion the reserved power of the council.

An allegation, therefore, that the petition was not "signed by the owners," does not overcome the presumption that the council had before it a petition purporting on its face to meet the requirements of the law, and is insufficient.

The city council in such a case acts, in determining the sufficiency of the petition before it, in a judicial character. *Tibbetts v. W. & S. T. Ry. Co.*, 54 Ill. App. 160.

And a court of equity should not interfere with such a determination except upon a clear showing of a lack of power by the council to do the act complained of.

In the *Vandehouten* case the bill, after averring the passage of the ordinance by the city council, under which permission was granted to the appellant to lay tracks on the streets therein named, including that portion of Grand avenue upon which complainant's lot abutted, alleged:

That the said defendant corporation had obtained, prior to the enacting of the said ordinance, the necessary petitions of the land owners in and along the said streets and avenue, save and except as to the said avenue known and described

in the said ordinance as Grand avenue, and that as to said Grand avenue, such petitions were only obtained for the construction of railroads upon the said avenue between Chicago avenue and Crawford avenue, and that as to the said Grand avenue between Indiana street and Chicago avenue no such petition was ever obtained or filed with the city clerk of the city of Chicago, and states and charges the fact to be, that the said ordinance, in so far as it provides for the laying of tracks or the construction of railroads between said Indiana street and the said Chicago avenue on said Grand avenue, was enacted without any petition whatever of any of the property owners abutting thereon, and is to that extent void.

The substance of that allegation is that the council had before it a proper petition for the granting of the use of streets named, including that part of Grand avenue between Chicago avenue and Crawford avenue, but not including that part of Grand avenue between Indiana street and Chicago avenue.

The grant of the use of said streets and both portions of said Grand avenue, was given by the same ordinance. And it is alleged that the "necessary petitions" of the owners along and upon said avenue, except as to that part thereof between Indiana street and Chicago avenue, had been obtained by the appellant.

We can not take judicial notice of the distance apart of the various streets of Chicago, and whether Grand avenue is one or more miles, or is but a fraction of a mile in length between Indiana street and Crawford avenue, and what the distance is between Indiana street and Chicago avenue, is not alleged in the bill, nor is it alleged that the "necessary petition" for the granting of the use of that part of Grand avenue between Chicago avenue and Crawford avenue did not contain the consent of the owners of sufficient frontage to cover the distance between Indiana street and Chicago avenue. The distance between Indiana street and Chicago avenue, along Grand avenue, may, for anything alleged in the bill, be but a quarter of a mile, and the initial point of

North Chicago St. R. R. Co. v. Cheetham.

the grant may be, for aught that appears, at Indiana street, and then, in such a case, it would be sufficient if, in the other three-quarters of a mile beyond Chicago avenue, enough frontage consent was secured to equal more than one-half of the frontage of the mile in which that portion of Grand avenue between Indiana street and Chicago avenue was included.

It may well be that although a majority of the frontage between Indiana street and Chicago avenue did not petition for the permission, yet that a majority within the mile of which that portion was but a part did join in the petition.

The rule that allegations will be most strongly construed against the pleader is applicable, and should be enforced in cases like this, where the validity of the act of a public body is involved. There was here a petition before the council, and in the absence of explicit and positive allegations the sufficiency of the petition should not be denied.

There is always to be observed the difference between the exercise of an excess of authority and a total lack of power.

It is only in cases of the latter character that courts will interfere with the acts of bodies charged by law with the discharge of public duties, and then only when the lack of power to do the particular thing complained of is clearly shown. Presumptions will not aid pleadings in such cases.

The validity or invalidity of the ordinances in question can be determined only upon the allegations in the bills of complaint, and upon them, as pointed out, and perhaps in other respects, a discussion of which would unnecessarily prolong this opinion, we are of opinion that the injunctions complained of were improvidently granted.

The order, therefore, in each case, will be that the judgment of the court below be reversed, with directions to dismiss the bill.

MR. JUSTICE GARY.

It is mere opinion whether the owner of a lot abutting upon a street will be injured or benefited by putting into

the street additional facilities of access by residents along the street to a business center.

Whether those facilities are put there with or without lawful authority is by itself no ground for a court of chancery to act upon; before its aid can be asked, injury to the applicant, without an adequate remedy at law, must be shown.

If by a street railroad such owner is injured, he may recover damages at law, and then a court of equity, if such damages can not be collected, will come to his aid. Penn. M. L. Ins. Co. v. Heiss, 141 Ill. 35.

I am of opinion that a property owner has no standing in a court of equity, under any circumstances, to restrain the construction of a street railroad. If there be a purpessure—occupying the street without legal authority—the remedy is for the State. 4 Bl. Com., 167.

If private property is damaged, the owner may have his action on the case. Tibbetts v. West & South Towns St. Ry. Co., 54 Ill. App. 180.

58 328
80 176

**Jacob Newman, George W. Northrup, Jr., S. O. Levinson
and B. V. Becker v. Henry Schueck.**

1. **NEGLIGENCE—Of Attorney, is of His Client.**—Negligence of the attorney is negligence of the client.

2. **ATTORNEY—Liability for Negligence.**—If by the negligence of an attorney an unjust judgment has been obtained, the injured person has a remedy by action against the attorney.

3. **NEW TRIALS—In Courts of Equity.**—Courts of equity do not grant new trials upon the mere ground that a defendant has failed or omitted to make a defense at law, even although the judgment may appear to be wrong in law or opposed to the facts. It must appear that the judgment was the result of fraud, accident or mistake without the fault or negligence of the party against whom it is rendered.

Bill for Injunction.—Appeal from an order restraining the collection of a judgment, entered by the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Submitted at the March term, 1895. Reversed. Opinion filed April 4, 1895.

STATEMENT OF THE CASE.

This was a bill for injunction filed by appellee, Henry Schueck, the allegations being in substance, as follows:

That Henry Schueck and William Recht had been, up to October, 1890, copartners, doing a mercantile business in Chicago, under the firm name of Schueck & Recht; that in the course of said business, they became indebted to various eastern houses for merchandise purchased; that in the year 1890, Schueck & Recht met large and unexpected losses, and became unable to pay their debts; that they were indebted for merchandise to the firm of Friedberger & Co. in the sum of \$829, to the firm of Strand Brothers in the sum of \$586.28, and to the firm of Schuer & Brothers in the sum of \$974.50, and that said firms, through Jacob Newman, their attorney, on the 20th of October, 1890, brought suits in the Circuit and Superior Courts of Cook County, Illinois, in the nature of actions on the case, for false representations in procuring goods from said firm on credit; that Schueck & Recht retained the law firm of Kraus, Mayer & Stein to represent and defend them in these suits.

Proper pleas were filed, and in December, 1892, said law firm withdrew, and attorney James J. Hoch was retained. Hoch at once entered his appearance in writing in these suits, and they remained pending for about two years.

That on the 28th of March, 1894, November 14, 1893, and March 14, 1894, respectively, trials were had, and the plaintiffs recovered judgments for said amounts in said suits at law; that executions in the nature of *capii ad respondendum* were duly issued on these judgments, and on the 8th of January, 1895, Schueck was notified for the first time that such capiases were outstanding against him and his partner.

That complainant was never notified by his attorney, Hoch, of the trial of these actions; that he had wholly intrusted his defense to said Hoch, and wholly relied upon him; that he had a good and valid defense to said actions as far as concerned the allegations of fraud, and that he had not been guilty of any tort whatever; that the state-

ments made to the mercantile agencies and to the plaintiffs concerning the financial standing of the firm of Schueck & Recht were true, and he could substantiate them at another trial; that neither he nor his partner was present at the time of the trial or entry of judgments in said causes; that unless the judgments and capiases are enjoined, he (Schueck) would have to go to jail, as he was penniless, and had no means of paying the judgments; that if the court would open up the cases and allow him to interpose his defense, he could show that he had not been guilty of any tort whatever; that the court terms had passed, and he had no remedy except in a court of equity; that he "caused inquiry to be made of the said Hoch" as to why he (Schueck) had not been notified of the trial of the cases, and that Hoch said that he did not know that his appearance had been entered, and that he did not know that he was to represent Schueck & Recht in these cases, and that his clerk had entered his appearance without his authority or consent. Complainant prays that the proceedings be enjoined, and that a new trial be had, so that he may interpose his defense.

This bill is sworn to by the complainant, in which affidavit he also states that he is penniless, and prays that an injunction may issue without bond and without notice.

And thereupon, on the tenth day of January, 1895, the Circuit Court of Cook County granted the injunction complained of, without notice and without bond.

Appellants, on the 22d of January, 1895, moved the court for a rule on complainant to file bond, as required by statute, in case of an injunction against judgments. This motion was denied.

Then appellants moved for a dissolution of the injunction by reason of the failure of the complainant to file bond as required by statute, and also upon the face of the bill as showing no equity. This motion was heard and argued and denied by said Circuit Court.

Appeals were duly prayed and allowed from the original order granting the injunction, and also from the order denying appellant's motion to dissolve the injunction.

Newman v. Schueck.

APPELLANTS' BRIEF, NEWMAN & NORTHRUP AND S. O.
LEVINSON, ATTORNEYS.

Equity will not relieve against a judgment at law on account of any ignorance or unskillfulness of the party's attorney (unless caused by the opposite party), nor for counsel's negligence or inattention. The fault is, in such cases, attributed to the party himself. Thus, the neglect of an attorney to plead a valid or proper defense, or to attend the trial, either intentionally or through forgetfulness, and his failure for like reasons to notify his client of the time of trial, whereby a judgment is wrongfully obtained against the client, furnishes no ground for relief against the judgment. Black on Judgments, Vol. 1, Sec. 375; *Crim v. Handley*, 94 U. S. 652; *Winn v. Wilson*, 1 Hemp. 698; *Warner v. Connant*, 24 Vt. 351; 58 Am. Dec. 178; *Winchester v. Grosvenor*, 48 Ill. 517; *Dinet v. Eigemann*, 96 Ill. 39; *Kern v. Strasberger*, 71 Ill. 413; *Fuller v. Little*, 69 Ill. 229; High on Injunctions, Vol. 1, Sec. 165 *et seq.*; *Beach on Injunctions*, Vol. 1, Sec. 685; *Bardowski v. Bardowski* (Ill.), 33 N. E. Rep. 39.

The fact that an attorney engaged to defend a suit neglects to do so, is no ground for enjoining the enforcement of a judgment against his client; the only remedy of the judgment debtor, if he was damaged, is against the attorney. *Barhost v. Armstrong*, 42 Fed. Rep. 2; *Beach on Injunctions*, Vol. 1, Sec. 685.

There is no distinction where the judgment is in tort, the rule being identically the same. High on Injunctions, Vol. 1, Sec. 171; *Meredith v. Benning*, 1 Henning & Munford (Va.) 585; *Haughy v. Srang*, 27 Am. Dec. 648 (Ala.); *Walker v. Shreve*, 87 Ill. 474.

To warrant a court of equity in reviewing a judgment and enjoining proceedings thereunder, the party seeking relief must show not only that injustice has been done him, but also that he was prevented from procuring his cause of action or interposing his defense by fraud, accident, or the act of the opposing party, wholly unmixed with any fault or negligence of his own; and the diligence required to be used to prevent injury is such as prudent and careful men would

ordinarily use in their own causes of equal importance. Such pleas seeking relief from final judgments, solemnly rendered in the due and ordinary course of the administration of justice, by courts of competent jurisdiction, are always watched by courts of equity with extreme jealousy, and the grounds upon which interference will be allowed are confessedly narrow and restricted. Beach on Injunctions, Vol. 1, Sec. 686; Wood v. Lenox, 23 S. W. Rep. (Tex.) 112 (1893); Johnson v. Templeton, 60 Tex. 238.

A partner is liable for the tort of his copartner in the regular course and within scope of the business. Bates on Partnership, Vol. 1, Secs. 461 *et seq.*; Loomis v. Barker, 69 Ill. 360; Durant v. Rogers, 87 Ill. 508.

The negligence of an attorney is the negligence of his client. Mendell v. Kimball, 85 Ill. 582; Trentler v. Halligan, 86 Ill. 39; City v. Thomas, 102 Ill. 453; Thielmann v. Berg, 73 Ill. 293; Schaefer v. Sutton, 409 Ill. 506.

APPELLEE'S BRIEF, STEIN & PLATT, ATTORNEYS.

An injunction directed against the enforcement of a judgment by levy of execution upon a particular piece of property, or by levy of a particular form of execution is not an "enjoining of a judgment" within the meaning of the statute requiring bond in such case. Fahs v. Roberts, 54 Ill. 192; Moriarty v. Galt, 28 Ill. App. 213; same case, 125 Ill. 417; Hardin v. White, 63 Ia. 633; Stanley v. Bonham, 52 Ark. 354.

The rule that the fault of an agent or attorney is attributed to the principal does not apply where the consequences of such rule would be the imprisonment of the principal. Bates on Partnership, Secs. 468 and 1120; Stewart v. Levy, 36 Cal. 159; McNeely v. Haynes, 76 No. Car. 122; Baker v. Kendall, 17 J. & S. 123.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Interest reipublicae ut sit finis litium, might be replied to the pathetic appeal of appellee in which he asks if he must

Newman v. Schueck.

be imprisoned because by the judgment of a court he has been found guilty of doing that of which, he says it is by the pleadings in this cause admitted, he was innocent.

Matters in controversy can not be litigated over and over, although, after judgment, the defeated party is willing, with specification and detail, to make oath that the judgment rendered is unjust and opposed to the truth. Every person is by natural right entitled to one hearing; if being duly summoned, he willfully neglects to heed the same and suffers judgment to go against him, he is not entitled to another trial.

The bill in this case sets forth that the complainant was duly summoned in an action on the case; that he retained an attorney to defend the same; that the appearance of the attorney was entered and that thereafter he paid no attention to the cause, suffering judgment to be entered without notifying his client and without resistance.

The complainant therefore asks that a court of chancery give him a new trial. If the able and industrious counsel who represent him in this litigation shall fail to reply to an answer that may be filed and shall also fail to notify him or fail to be themselves present at the hearing of this cause, will the complainant be entitled to maintain another bill after this cause shall have been heard and dismissed on bill and answer?

It is the settled rule in this State that negligence of the attorney is negligence of the client. *Clark v. Ewing*, 93 Ill. 572-578; *Yates v. Monroe et al.*, 13 Ill. 219; *Kern v. Strausberger*, 71 Ill. 413; *Trentler v. Halligan*, 86 Ill. 39; *High on Injunctions*, Secs. 166; 210, 221; *Graham & Waterman on New Trials*, Vol. 3, 1520.

If, through the negligence of the attorney employed by the complainant, an unjust judgment has been obtained against him, he has a remedy by an action against such counsel.

The allegation of the bill is that James J. Hoch was retained; this is a conclusion. What was done by which he was retained? From the bill it appears that Hoch claims

that he did not understand that he had been retained in the cause in which the judgment complained of was rendered, and did not know that his appearance had ever been entered therein.

The bill fails to negative negligence upon the part of the complainant in failing to retain an attorney, or in an attorney in failing to attend to a suit he was employed to defend.

If the allegations of the bill are true, complainant had a complete defense to the suit, it being an action on the case, based upon an alleged fraud.

Appellee asks: "Is it right that he should go to jail for an offense of which he is guiltless?" It is not, but how is the question of his alleged guilt to be determined? Certainly, after some judgment, such question must be at rest.

Appellee was duly summoned; he had an opportunity to be heard.

If a new trial before a jury should be given him and the attorney next employed should fail to defend, would he be entitled to another trial?

Courts of equity do not grant new trials upon the mere ground that a defendant has failed or omitted to make a defense at law, even although the judgment may appear to be wrong in law or opposed to the facts. *Hinrichsen v. Van Winkle*, 27 Ill. 334; *Holmes v. Stateler*, 57 Ill. 209.

It must appear that the judgment was the result of fraud, accident or mistake without the fault or negligence of the party against whom it is, or the court will not interfere. *Hinrichsen v. Van Winkle*, *supra*; *Marine Ins. Co. v. Hodgson*, 7 Cranch 332.

Appellee urges that he only asks to have restrained an execution of the *ca. sa.*

If the plaintiff was entitled to the judgment he obtained, he is entitled to such writ. Whether he ought to have such judgment was the question submitted to the court in that case. However, the relief the complainant asks may be stated, in effect, that new trials be granted him, and that meanwhile the operation of the judgments be stayed.

Appellee has obtained an injunction restraining the execution of the writs issued upon the judgments, without giving any bond, either for the payment of the judgments, or that he will surrender himself in case the judgments shall be affirmed; nor does he in his bill offer to either pay or surrender himself, or to pay the expense which the appellants have been or may be put to in obtaining their judgments, in case the result of new trials should be the same as of those already had.

There are statutes in some States under which, where, through the negligence of an attorney in failing to appear, judgment has been obtained, the same has been set aside in a new proceeding. In New York a party may be relieved from a judgment obtained against him by reason of the negligence of his attorney, he being free from fault. *Sharp v. Mayor of New York*, 31 Barb. 578; *Wash v. Wetmore*, 33 Barb. 159; *McKinley v. Tuttle*, 34 Cal. 235; *Beatty v. O'Connor*, 106 Ind. 81; see, also, *Thompson v. Goulding et al.*, 5 Allen 81-82; *Crawford v. Williams*, 1 Swan. (Tenn.) 341; *Paneri v. Boswell*, 12 Heisk. 323.

The general rule is otherwise. *Stephenson v. Wilson*, 2 Vernon, 325; *Ware v. Horwood*, 14 Vesey, 29-31; *Drewry v. Barnes*, 3 Russ. 94.

Mutual mistake is one of the sources of the jurisdiction of a court of equity. Mr. Hoch was retained by appellee, yet by mistake thought he was not; the mistake was not mutual as between the parties to this cause.

If the bill of appellee set forth facts showing that he had employed Mr. Hoch to attend to these cases; that he mistakenly supposed himself not to be so employed, showing how such mistake occurred; and that appellee rested under the belief that Mr. Hoch was retained and would properly defend the suits; and if the bill further specifically offered to do equity, the writer of this opinion is inclined to think that, upon proper terms, relief might be afforded.

The order granting the injunction is reversed.

58	336
69	606
58	336
70	275
58	336
90	31

John Marthaler v. A. Druiding and George Kersten.

1. **SURETIES—When Sued Must Make Defense.**—A surety is bound by the letter of his bond; but when sued upon it, he must make his defense in such a manner that if the court disregards it, the court errs and he must preserve the error.

2. **APPELLATE COURT PRACTICE—Objections Must Be Specific.**—Objections to evidence in the court below must be specific, and the grounds of the objection must be pointed out. The Appellate Court is one of review; a point not made in the court below can not be made there.

3. **SAME—Points on Rehearing, Not in Original Brief.**—A point not made in appellant's original brief can not be made on petition for rehearing.

4. **INJUNCTION BONDS—Actions on, Without Assessment of Damages.**—An action lies on an injunction bond without a previous assessment of damages by a chancellor.

Debt.—In the Superior Court of Cook County, on appeal from a justice of the peace; the Hon. JONAS HUTCHINSON, Judge, presiding. Trial by the court; finding for plaintiff; appeal by defendant. Heard in this court at the October term, 1894, and affirmed. Opinion filed February 12, 1895.

JOHN N. JEMISON, attorney for appellant.

GOLDZIER & RODGERS, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

June 25, 1891, Druiding recovered before a justice a judgment for \$120 and costs against one Gerarty, who, instead of appealing while there was yet time, obtained an injunction to restrain the collection of the judgment, and gave a bond with the appellant as surety. That case is reported in 44 Ill. App. 440. The bond was not conditioned, as Sec. 8, Ch. 69, "Injunctions," requires, to pay the judgment, but only to pay such costs and damages as should be awarded.

The appellant is a surety and only bound by the letter of the bond; but when sued upon it, he must make his defense in such manner that if the court disregards the defense, the court errs. And he must preserve the evidence of the error, if the court does err, in such manner that the error can be corrected by a court of review. Neglecting these precautions, he must abide the judgment of the court.

Marthaler v. Druiding.

Now the declaration shows a breach of the condition of the bond, in not paying costs awarded; and also claims the non-payment of the judgment as damages.

On the trial before the court without a jury, Mr. Waters, being the appellees' attorney, and putting in evidence the transcript of the justice, and the record of the court by which the injunction was issued and dissolved, thereby showing the same damages as the appellees would have been entitled to, had the bond been properly conditioned, the appellant's attorney said: "We will compare those items, Mr. Waters, and see if I have them right;" and then said to the court, "I now repeat my objection to the evidence as not supporting the declaration, and incompetent, insufficient and immaterial." Such an objection raises no question here.

So much, at least, of that evidence, as showed the costs awarded, was competent, material, and in support of the declaration. Nowhere did the counsel single out the objectionable part and object to it alone. Nowhere did he call the attention of the court to the form of the condition of the bond, and that some portion of the evidence did not fit. Thompson on Trials, Sec. 693, *et seq.*

And in no way, either by objecting to the amount of the finding, or on a motion for a new trial, did he endeavor to show to the court that damages claimed or allowed were not within the condition.

This is a court of review. A point not made below can not be made here. Keely v. City of Chicago, 148 Ill. 90; Roseboom v. Whittaker, 132 Ill. 91; Joseph v. Fisher, 3 Scam. 137.

Whether the judgment is in the right form is not questioned by the assignments of error, nor shown by the abstract, and complaint of it in the brief goes for nothing.

The judgment is affirmed.

GARY, J., ON REHEARING.

The appellant petitions for a rehearing, making the point that no action lies to recover damages sustained by an injunction, unless they have been awarded by the chancellor

on dissolving it; citing *Russell v. Rogers*, 56 Ill. 176; *Brownfield v. Brownfield*, 58 Ill. 152, and *McWilliams v. Morgan*, 70 Ill. 551.

There are two good reasons for denying his petition:

First, that point was not made in the court below, nor in the original brief here of appellant. The court will not grant a rehearing upon a point made for the first time in the petition for a rehearing. *Gaines v. Williams*, 146 Ill. 450; *People v. Harrison*, 150 Ill. 122; *Hewett v. Griswold*, 46 Ill. App. 269.

Second, though from 1861 to 1874, the law was as the petition states it now to be, yet, before 1861 the law was, and since 1874 the law has been, and now is, the other way. *Linington v. Strong*, 8 Ill. App. 384. The petition is denied.

Henry Vocke v. Claudius Peters.

1. **ABSTRACTS**—*Index—Insufficiency*.—An abstract which is but an index is insufficient.

2. **STATUTE OF FRAUDS**—*What Is Not Within*.—A contract for an agreed compensation or commission for business brought to a firm of lawyers, which might have been done within a year from the time of making it, is not within the statute of frauds.

3. **CONTRACTS**—*For a Commission on Business Brought to Attorneys*.—A contract for an agreed compensation or commission upon business brought to a firm of attorneys is not contrary to public policy.

4. **VERDICTS**—*Contrary to the Evidence*.—While the Appellate Court may be of the opinion that a verdict should have been for the other party, yet, where the evidence is conflicting and with a slight preponderance in favor of either party, it will not disturb it.

Assumpsit, for services commenced in justice's court. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

THOMAS J. HOLMES, attorney for appellant.

J. G. GROSSBERG, attorney for appellee.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

58	336
60	444
58	338
62	637

Vocke v. Peters.

This was a suit to recover an alleged commission for bringing business to a firm of lawyers. The abstract of the record after setting forth the evidence in the case concludes as follows:

41. Instructions to the jury.
41. Finding of the jury.
- 41-2. Motion for a new trial.
42. Overruling of the motion.
- Entering up judgment on the verdict.
43. Certificate of judge.
44. Stipulation as to bill of exceptions.
- 45-6. Bond.
47. Certificate of the clerk.
48. Assignment of errors.

Such an abstract leaves no question for our consideration except that of the admission and the sufficiency of the evidence; as to all else the abstract is but an index. *Ward v. Stanley*, 41 Ill. App. 417.

We do not regard the statute of frauds as having any bearing upon this case. The action is really for an agreed compensation or commission for business brought to appellants.

All that was undertaken by appellee might have been done within a year, and seems to have been performed within that period from the time promise was made to him. As to which see *Walker v. Johnson*, 96 U. S. 424; *Swanzey v. Moore*, 22 Ill. 63.

This suit is not to compel the carrying out of an agreement but to recover for work done.

According to the testimony of the appellee, appellants first promised him a commission for business brought, and then accepted the business.

Whatever courts may have in former times held as to such agreements, the Supreme Court of this State long ago refused to consider contracts by lawyers for contingent fees as contrary to public policy; if such are not, we do not think that an agreement to bring business to a lawyer can be so regarded. *Dunne v. Herrick*, 37 Ill. App. 180.

Courts have a discretion as to the admission of evidence

out of its order, which is very seldom interfered with by a reviewing tribunal.

Our own opinion is that the jury should have returned a verdict for the defendants. The evidence is conflicting to that extent and with so slight a preponderance in favor of either party, that we do not feel warranted in reversing the judgment which the Circuit Court has rendered upon the verdict. It is therefore affirmed.

FURTHER OPINION ON REHEARING BY MR. PRESIDING JUSTICE WATERMAN.

Appellant, seeming to be of the opinion that this case is the only instance in which we have refused to consider such portions of the record as are not abstracted, attention is called to the case of *Woven Cord Bed Spring Co. v. Cox-edge*, 50 Ill. App. 334, and cases there cited; also to *John B. Mallers v. Crane Elevator Co.*, 57 Ill. App. 283.

This case comes to this court with the verdict of the jury approved by the judge of the court below. He saw and heard the witnesses testify; we have only a written record, from which, as before stated, we think that the verdict should have been for the defendant. The trial judge having opportunities that we have not, has rendered judgment upon the verdict, and in the conflict of evidence we do not feel warranted in reversing the judgment.

The petition for rehearing is denied.

William Harlev and Alfred Harlev v. David Weiner.

1. *INSTRUCTIONS — Where the Evidence is Conflicting.*—Where the evidence upon the trial of an issue of fact is conflicting, it is highly necessary that the instructions should be reasonably free from error.

2. *SAME—Error to Assume the Existence of Fact.*—An instruction which assumes the existence of a controverted fact, is erroneous.

Replevin.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Submitted at the March term, 1895, of this court. Reversed and remanded. Opinion filed April 23, 1895.

JOHN J. COBURN and LAWRENCE M. ENNIS, attorneys for appellants; HENRY M. COBURN, of counsel.

Harlev v. Weiner.

JAMES B. MUIR and ROBERT H. VICKERS, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action of replevin brought by the appellee against the appellants to recover possession of 1,000 cords of wood and 100 logs.

The said property was taken under the replevin writ, and the judgment was that the appellee have and retain the same, and that he recover his damages of \$84 and costs.

It may be assumed that the appellants had a contract with the Sanitary District trustees to perform certain work on the main drainage canal, which necessitated the removal by them from a certain portion of the right of way for said canal, of all timber, stumps, brush, etc., thereon growing or standing.

On January 18, 1893, they made a contract with one Nelson Bleau to do that work, whereby Bleau was to pay appellants \$2,500.10 from time to time as demanded, and was to have all the timber, brush and materials taken from the land, the appellants reserving for themselves a lien upon such timber, etc., until said \$2,500 should be fully paid to them.

By a writing, dated March 10, 1893, the appellee made a proposition, not addressed to any one by name, to cut and remove all logs, trees and brush remaining on said land, in consideration of having "all remaining wood left on said section," and to pay \$100 "for all wood cut up to this date." By the proposition appellee agreed to do the work "in a manner best suited to Harlev & Son (the appellants), contractors for said section."

Bleau indorsed on the back of the written proposition, as follows: "We accept the within proposition of David Weiner.

NELSON BLEAU.

Authorized by Harlev & Son to make the agreement."

For the \$100 so specified, the appellee executed and delivered his promissory note, payable to the order of Bleau,

thirty days after date, and paid the note on April 24, 1893.

Trouble arose between appellants and appellee because the latter refused after having cut the wood, to pull the stumps, claiming that such was not his duty under his contract, and appellants stopped the appellee from removing the wood that remained on the ground, and which was the subject of the replevin. Notwithstanding the appellants reserved a lien upon the wood, etc., by the terms of the contract with Bleau, dated January 18th, it was competent for them by subsequent arrangement with Bleau to authorize the contract of March 10th with the appellee, or to ratify it after it was made. There was much evidence heard on both sides, touching both the authority of Bleau by the appellants to make the contract of March 10th with the appellee, and the inducement to appellee under such authority to enter into said contract, and touching appellant's subsequent knowledge and ratification of it, and such evidence was most conflicting in its character.

The questions arising upon the evidence were of a kind peculiarly within the province of a jury, and the evidence being conflicting, the verdict of the jury would be final, and treated as conclusive in an appellate tribunal, if the cause had been submitted to the jury upon proper instructions. It is hardly necessary to say that facts are for the jury and not for the court, and therefore, when the trial judge refused each and all of the instructions asked by the defendants, and of his own motion prepared and gave, as his own, to the jury, a substitute for the defendant's instructions, it was highly necessary that such an instruction should be reasonably free from error, and should not tell the jury what the fact was upon a vital issue in the case.

As already said, it was a controlling issue in the case whether the contract of March 10th, that Bleau made with the appellee, was authorized by the appellants. Recognizing the importance of that issue, the judge in his instruction says: "It is therefore important for you to consider the effect of this contract of March 10, 1893, upon the rights of the defendants, Harlev & Son, *and authorized by them,*"

Nat. Bank of Illinois v. Baker.

etc. The italics are ours. The whole context is obscure (see *Haskin v. Haskin*, 41 Ill. 197), but need not be quoted, for read as the average jury would read, or understand if read to them, this was equivalent to telling them that the contract referred to *was authorized* by appellants—a most important and determinative fact in the case.

We not infrequently have some reason to guess that records brought to this court do not speak the verity that the law clothes them with, and being familiar, as we are, with the legal acumen of the learned trial judge we may guess so in this instance, but doing so does not avail.

Notice of the defect in the instruction has been prominently urged upon us by appellant's counsel in their brief, and no attempt has been made to cure the record by amendment if it were susceptible of cure, and we must reverse the judgment for that error, if for no other. Other errors have been urged, which are not likely to occur on another trial, even though they exist here now, and we consequently omit discussion of them.

The judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

58	343
69	654

National Bank of Illinois and George Schneider v. Mary S. Baker.

1. APPELLATE COURT PRACTICE—*Variances to be Pointed Out.*—A party litigant who relies upon a variance between the pleadings and the proofs, must point it out; the court will not hunt for it.

2. SAME—*Questions Not Raised in the Court Below.*—A question not raised in the court below, can not be raised in the Appellate Court.

3. INTEREST—*As Damages on Appeal.*—Where money belonging to a party litigant is tied up by an appeal, depriving such party of its use, it is proper to allow interest on the same as damages, under the condition of the appeal bond.

Debt, on penal bond. Appeal from the Superior Court of Cook County; the HON. NATHANIEL C. SEARS, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

MATTHEW P. BRADY, attorney for appellants.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action of debt on the bond given by the bank in *National Bank of Illinois v. Baker*, 27 Ill. App. 356, 128 Ill. 533, on appeal from the judgment of this court. The abstract shows that when the bond was offered in evidence, the appellants objected that it was variant from that described in the declaration, and they repeat that objection in the brief here, nearly in the same words, but neither there nor here was or is there any specification of any variance. We shall not hunt for it. *Nelson v. Smith*, 54 Ill. App. 345; *Hess v. Rosenthal*, 55 Ill. App. 324.

The real question in the case is whether, under a condition to "pay the amount of any judgment, costs, interest and damages rendered against it in said Supreme Court, and all damages that shall be sustained by said Mary S. Baker, by reason of said appeal from the Appellate Court to the Supreme Court," she is entitled to recover interest on the sum over \$4,000, which other parts of the condition show were stayed in the hands of the clerk of the Superior Court by, first, the appeal to this court, and next to the Supreme Court.

If she is entitled to any interest, the amount allowed, not being made a question below, can not be here, even if it were assigned in terms for error, which it is not. *Leyenberger v. Rebanks*, 55 Ill. App. 441; *Heffron v. Brown*, 54 Ill. App. 377; *Giffert v. McGuern*, 51 Ill. App. 387.

The statute relating to interest has nothing to do with this case except furnishing a rate if she be entitled to interest as "damages" under the condition of the bond.

The reason given in *Chi. & N. W. R. R. v. Schultz*, 55 Ill. 421, for allowing interest upon the value of a colt killed, by negligence, viz., that the owner was entitled to compensation, applies here. She "has not had the money or its use since" it was tied up by the appeal.

That is a damage to her, and by contract they are bound to pay the damage she sustained. The judgment is affirmed.

Charles Mears v. S. Ella O'Donoghue, Executrix of Robert W. Smith.

1. **CONTRACTS—For Services by the Year—Presumption as to Continuance.**—The terms of a yearly contract for services will be presumed to continue from year to year, so long as the employment lasts, unless the contrary is shown, and in the absence of sufficient evidence to show a change in the terms of the employment, proof of the original contract will limit the right of recovery to the yearly salary at the original rate.

2. **EVIDENCE—Indirectly Tending to Establish the Issue.**—On the trial of an issue of fact as to whether a contract was for services at a yearly salary or general, for what the same were seasonably worth, it is error to exclude testimony showing what the contract was at the beginning, upon the ground that such testimony does not cover the period for which the suit is brought.

Assumpsit, for legal services. Appeal from the Superior Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Submitted at the March term, 1895, of this court. Reversed and remanded. Opinion filed April 22, 1895.

HENRY C. NOYES, attorney for appellant.

FRANK A. JOHNSON, attorney for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action brought by the executrix of Robert W. Smith, a deceased member of the bar, for a balance due on an account for legal services rendered to appellant from November 1, 1882, to May 25, 1888.

It was stipulated that the itemized statement of account shown in the transcript of record was a correct transcript of the items of charges against and credit to appellant, and of the dates thereof as made by the decedent, Smith, in his lifetime, in the book of original entry kept by him, and that the said items are entered in the same manner as similar items with other of his clients, and that said book was kept in the regular and customary manner of keeping day books or of original entry, and that there is nothing in the con-

tents or appearance of said book which tends to cast any suspicion thereon or upon the items therein of charge against or credit to said appellant, and that so far as said book is concerned, it shows that charges were regularly made by said Smith against appellant, for services rendered by Smith in precisely the same manner as they were made by him against other clients who made settlements by said book.

The account shows two hundred and thirty-eight items of charge for services, ranging in amounts charged from three dollars to seventy-five dollars, and covering the whole of said period of five and a half years, aggregating a total sum of \$1,981.

The credits shown were admitted to be correct in dates and amounts, and with but one exception appear as "By cash on account." The single exception under date of November 2, 1883, is:

"By cash in full for examination of Andrews abstract, \$25." Those credits were of \$100, September 14, 1883; \$300, October 14, 1884; \$200, June 19, 1885; \$300, August 1, 1886; \$150, June 21, 1887, making in all \$1,075.

The defense to the action was that about the year 1865 the appellant employed Smith (to quote from appellant's brief) "as his attorney to attend to his law business in the city of Chicago upon a salary of \$200 per year. Appellant claims that he has always paid Smith at that rate, as his salary, and that there is only due the appellee the sum of \$38.88." Appellant also says in his brief: "The account so far as services are concerned, is not disputed; neither is it disputed as to the credits allowed in said account. * * * The only question before this court, is: Was Smith doing business for Charles Mears upon a salary of \$200 a year, commencing in 1865 and ending in 1888, or was he doing business by the job, as shown by the account from November 1, 1882, to May 25, 1888?"

There is no evidence that Smith kept any account of services rendered appellant prior to November 1, 1882.

A verdict was rendered and judgment entered for \$854 in favor of appellee.

Mears v. O'Donoghue.

On the trial one Stimpson was called as a witness for appellant. He had been bookkeeper for appellant from 1865 until 1872, and again from June, 1888, until July, 1892. The account sued on, it will be remembered, began November 1, 1882, and ended May 25, 1888, during no part of which period was Stimpson in appellant's employment.

The appellant offered to prove by Stimpson what the arrangement or contract was between Smith and the appellant when the relationship of attorney and client between them first began in 1865, and that such contract was continued until 1872, but such evidence being objected to by the appellee was excluded, apparently upon the ground that it did not cover the period following the commencement of the services for which the suit was brought.

There was testimony by one Brown, a bookkeeper for appellant, from 1879 to 1888, that tended to prove that during those years Smith rendered the services sued for, under the claimed contract.

The majority of the court are of opinion that it was error to exclude proof, by the witness Stimpson, of the terms of the original contract entered into between Smith and the appellant, in 1865, under the rule of law laid down in numerous cases, that the terms of a yearly contract for services will be presumed to continue from year to year, so long as the employment lasts, unless the contrary is shown; and that in the absence of sufficient evidence to show a change in the terms of Smith's employment, such proof of the original contract would limit the right of appellee's recovery to the sum of Smith's yearly salary at the original rate for the years sued for. *Beeston v. Collyer*, 4 Bingham 517; *McKinney v. Peck*, 28 Ill. 174; *Grover & Baker v. Bulkley*, 48 Ill. 189; *Moline Plow Co. v. Booth*, 17 Ill. App. 574.

This is but an application of the general principle that a state of facts, continuous in its nature, once shown to exist, is presumed to continue until a change is shown. The writer of this opinion, agreeing with that legal proposition, thinks there is in the record sufficient evidence to overcome

a legal presumption that such contract was continued from the time when this account was opened, in 1882, until it ended in 1888. This account, commencing in 1882, appears to have been the first account that Smith ever kept with the appellant, although it is admitted that he had performed legal services for appellant continuously for a period of seventeen years preceding. From that time it was kept with the utmost minuteness, showing the great majority of the entries to have been for services, for which but \$3 and \$5 were respectively charged, and that only twenty-two out of the whole number of two hundred and thirty-eight entries, were for services for which over \$10 was charged.

There is also the special credit of \$25, already mentioned, for fees, for examining an abstract of title, which, unexplained, seems to indicate that services of a like kind, for which there are in the account numerous charges, were understood by the parties not to be within their contract, if there was one.

The great variety, also, of the services charged for, including consultations concerning foreign suits, the collection of insurance money, the signing bonds by appellant as security for third persons, the formation of corporations, security for loans by appellant, the leasing and selling of real estate, amendments to laws in another State, besides examination of abstracts of title, the beginning and trial of suits and general consultations, tend to give rise to presumptions that the original contract had been changed by the parties.

The writer thinks that taking into consideration all these circumstances, a sufficient presumption of a change in the contract relations of the parties arises to overcome the presumption that would arise in favor of appellee's contention, if it were proved that the original contract, as claimed, existed from 1865 to 1872, and that, therefore, the exclusion of Stimpson's testimony worked no substantial injury to the appellant.

But the majority of the court being of the opinion first stated, the judgment will be reversed and the cause remanded.

Farmers & Merchants Bank v. Albert C. Arnold, Zachariah C. Proctor and Lyman W. Arnold.

1. **CHATTEL MORTGAGES**—*Made in Missouri—Rights of Parties Under.*—The rights of parties claiming under a chattel mortgage made in Missouri, are governed by the law of that State.

2. **SAME**—*Identity of the Property.*—The identity of the property covered by a chattel mortgage may be shown by parol.

Bill for an Accounting, etc.—Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

W. A. HAMILTON, attorney for appellant.

FRANCIS A. RIDDLE and FRANK B. DYCHE, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant filed a bill to obtain the proceeds of sixty-eight head of cattle sold by the firm of Arnold, Proctor & Co., commission merchants at the stock yards in Chicago.

It is certain that the cattle were shipped from Missouri to the firm, by one Lyman W. Arnold, in the name of his mother-in-law, Sarah Topping, for the purpose of paying her money that he owed her.

The appellant claims that the cattle were part of those described in a mortgage by Lyman W. Arnold to the bank, upon "one hundred and thirteen (113) head of steer cattle, all dehorned, thirteen (13) of which are 'yearlings,' coming 'twos,' and the remainder are 'twos' and 'threes,' all purchased by me of McCausland, Hoag & Co., of Chicago, Illinois."

The rights of parties claiming under a chattel mortgage made in Missouri are governed by the law of that State, and the identity of the property may be shown by parol. Cases cited in *Clough v. Kyne*, 40 Ill. App. 234. But the

obstacle in the way of the appellant here is that no such proof is in the case. There is no testimony of what occurred when the mortgage was made, other than that of the cashier of the bank, that he then "had a man examine the security and he reported it sufficient." One of the directors of the bank testified that he went to "Shelbina," there saw a Mr. Lair, who showed a "bunch of cattle," and said that they were "the McCausland & Hoag cattle." Lair, as a witness, denied that statement. The director further testified that he saw the cattle in the stock yards; they looked like those he saw "in Shelby county," and to the best of his knowledge, they were the same. There is no other evidence on that point for the appellant, except the testimony of Lyman W. Arnold, who said that he did not think that more than ten or twelve of the sixty-eight could have been "McCausland & Hoag cattle."

The dealings between the bank and Lyman W. Arnold were many and irregular. Upon the whole testimony it is argued by the appellees, not without reasonable ground, that the mortgage had been paid; but we will not determine that point. The evidence shows that six or seven months after the mortgage was made, Lyman W. Arnold and Lair, with the assent of the bank, had a transaction by which Arnold delivered to Lair about one hundred and ninety head of cattle, among which were about seventy-five of those included in the mortgage, for which Lair gave to Arnold \$5,372 cash and a note for \$3,000 due in one hundred days; which was the price of the cattle, if sold, as Arnold and Lair say they were, at four cents a pound. At the same time Arnold and Lair agreed that at the end of one hundred days, Arnold was to take the cattle back at five cents a pound, and about one hundred days thereafter, Arnold did receive from Lair two hundred and ten cattle, part of them at five cents and part of them at four and a quarter cents a pound.

The appellant claims that this transaction was only "a feeding contract."

On this record it can not be told on what ground the court

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below went in holding that Mrs. Topping was entitled to the proceeds in controversy; but as there is no affirmative evidence of identity, that which is nearest to such evidence being the testimony of Arnold, that he did not know and did not think, the conclusion of the court—if that was its conclusion—that the identity was not made out, can not be held erroneous.

And if the transaction with Lair, being with the assent of the bank, was a sale, then the lien of the mortgage was gone. Whether the specific findings of the court in favor of Mrs. Topping are in the right words “is a matter of no consequence.” *Potter v. Gronbeck*, 117 Ill. 404-9.

On this record she seems to have been entitled to the money, as the court decided. She is dead and her administrator has appeared here in her place.

The decree of the Superior Court is affirmed.

**Detroit Copper and Brass Rolling Mills v. Matthew
Ledwidge et al.**

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68 663
162s 305

1. **COURTS OF EQUITY—Do Not Settle Legal Rights.**—Courts of equity do not assume to settle and establish purely legal rights; nor does the commencement of an attachment confer any right to the aid of a court of chancery. If a discovery is needed in aid of an attachment, it can be had through the means of garnishee process.

Bill for Relief.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

ROSENTHAL, KURZ & HIRSCHL, attorneys for appellant;
WILLIAM E. CHURCH, of counsel.

S. S. PAGE, attorney for judgment creditors.

WAGNER & KENDIG, attorneys for Ledwidge and Bennett.

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MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant was a contract creditor of the appellee Ledwidge, and filed its bill in equity against him, certain of his judgment creditors by confession, the sheriff of Cook county, and one Bennett. It was alleged that Bennett had in his possession and control, as a former employe of Ledwidge, certain books of account, records and vouchers of Ledwidge, and had knowledge of the names and addresses of certain debtors to Ledwidge which, if disclosed by him, would enable appellant to enforce an attachment which had been begun by appellant and was pending against Ledwidge; that Ledwidge had absconded and gone to Ireland, and that said judgment creditors had received from him, for collection, certain accounts under an agreement that after satisfying their own claims from such collections they, the said judgment creditors, would send the surplus to Ledwidge in Ireland, and thereby deprive appellant of all opportunity to collect its debt; that said judgment creditors had caused executions to be levied upon all the stock in trade and visible effects belonging to Ledwidge, and that said sheriff holds the same under said executions; that the value of said stock in trade was about \$15,000, and that said judgments of said creditors aggregated about \$24,000; and the prayer of the bill was that Bennett and the judgment creditors make discovery of such books, records, accounts and vouchers; that a receiver be appointed for the same, and that said attachment writ be enforced against the property discovered, and for general relief.

A general demurrer to the bill was sustained and the bill dismissed.

There are technical defects in the bill which might be sufficient to justify the sustaining of a demurrer to it, but we overlook them in order to pass upon the main question contended for by the appellant, that Ledwidge, having absconded and gone beyond the seas, so that it is impossible for process to be served and judgment obtained against him, and all his tangible property, less in value than the amount

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of the executions, having been seized by his judgment creditors, the bill should be sustained in order that Bennett and the judgment creditors should be compelled to discover who the debtors of Ledwidge are, to the end that they could be subjected to attachment or garnishment proceedings in favor of appellant.

The disposition to extend equity jurisdiction has, so far as we are advised, never been exercised to the limits asked by this bill.

There is no allegation in the bill of any trust or lien relationship, and there is no pretense of any equitable element in the debt owed by appellant; neither is there any fraud charged against Ledwidge or the appellees. It is simply the case of an indebtedness, which arose in the ordinary course of selling goods on credit to one in trade, and the going by the purchaser beyond the reach of legal process.

Courts of equity do not assume to settle and establish purely legal rights, nor does the commencement of an attachment suit confer any right to the aid of a court of chancery. If discovery is needed in aid of the attachment, it can be had through the means of garnishee process. *Bigelow v. Andress*, 31 Ill. 322.

The contention of the appellant that the elements involved make of this case an exception to the established rule often reiterated in this State, is best answered in *Dormueil v. Ward*, 108 Ill. 216, wherein it is said:

"These so-called exceptions, when properly understood, are rather nominal than real, for a bill of this character will not lie in any case where the claim, as it is here, is a purely legal demand. In all cases where such a bill has been maintained, the claim of the complainant has had some equitable element in it, such as a trust, or the like." See also *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603.

The judgment of the Superior Court will be affirmed.

Frank M. Block v. Swift & Company.

1. **VERDICT**—*When Directed for the Defendant.*—If the evidence, with all the inferences which the jury can justifiably draw from it, is legally insufficient to support a verdict for the plaintiff, it is proper for the judge to take the case from the jury by an instruction to find for the defendant.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

CASE, HOGAN & CASE, attorneys for appellant.

JOHN A. POST, attorney for appellee; SAMUEL S. PAGE, of counsel.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action for a personal injury received by the appellant, who was an employe of the appellee, an Illinois corporation, engaged in the business of packing and shipping pork, beef, etc.

At the conclusion of the plaintiff's case, the court instructed the jury to find for the defendant, and a verdict of not guilty was accordingly returned, and judgment was entered upon the verdict.

This appeal calls in question the correctness of that judgment.

The appellant worked twelve weeks for the appellee, before the injury was received, in "trucking hams." The injury he received resulted in the loss of one of his legs by amputation.

In their brief, counsel for appellant have stated the facts as disclosed by the evidence, as follows:

"Appellant was working in the packing house of appellee trucking hams, and in the line of his duty was engaged in

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taking up upon a freight elevator, a truck load of hams; the elevator was operated at the time of the accident by a man in charge thereof, who was stationed on the fourth floor, and who pulled a lever to run it; this operator was not on the elevator at all, but remained on the fourth floor, and worked the elevator up and down by the lever on the fourth floor; appellant was in the basement or ground floor, and had just placed his truck of hams on the elevator and got on himself with it, as was his duty, and there was also another man with a truck of hog fat, going up on the elevator; the elevator operator on the fourth floor shouted down to appellant, "Frank, she won't pull;" so appellant and the other man got off and left the door open. The operator called down again, "she won't go yet." Then the elevator went down about six inches below the level of the floor, and then rose again to the level of the ground floor, and then appellant stepped one foot on the elevator again to take hold of his truck and pull it off, so that the load would be lighter, and while he was engaged in doing this, the elevator started right up, flew up before he could get fully on or off, and he was caught between the elevator and the first floor.

The only other witness on the trial was Patrick Davorn, who testified that he was on the third floor at the time, and saw appellant down below when he was getting on the elevator, and saw the elevator immediately start up and injure him. He states that the elevator operator was stationed on the fourth floor and worked the elevator from there; that this operator could see down in the basement, and that he ran the elevator by sight; that the elevator should not be started till the men said "all right," or "pulled the bell."

The only objection made by counsel for appellee to the correctness of the facts so stated, is concerning the concluding portion of the statement. Reference to the abstract shows that in answer to the question of how the signal to start the elevator would be given, the witness said:

"You would close your door and say all right; also there

was a bell there to pull; you would pull your bell three times if you want to go to the third floor, and if you want to go to the first floor, you would pull it once."

It seems to us that upon the facts so shown, the Circuit Court rightly instructed the jury to find for the defendant.

Presumably after the two trucks and the two men had got on board the elevator, the signal by calling "all right," or by ringing the bell had been given to the operator of the elevator, and that the operator had pulled the lever to start the elevator, for he called down to appellant, "she won't pull," "she won't go yet."

Then the appellant and the other man got off, and still the elevator would not rise, but sank down six inches below the level of the floor; then the elevator rose again, and while it was in motion, ascending, appellant voluntarily stepped on the elevator, and it rising quickly, he was caught.

It is not pretended that there was any duty upon the part of the appellant in the performance of his work to get upon the moving elevator, and it is apparent that from the time the elevator began to rise from the level below the floor to which it had sunk, it made no stop until after appellant got upon it and was hurt.

Under such conceded facts, a verdict in the plaintiff's favor must have been set aside.

Where, then, was the need of submitting the case to the jury? It is the duty of a trial judge to determine whether there is or is not evidence legally tending to prove the fact or facts affirmed.

If the evidence with all the inferences which the jury can justifiably draw from it is legally insufficient to support a verdict for the plaintiff, or in other words, if such verdict would have to be set aside, if returned, it is proper for the judge to take the case from the jury by an instruction to find for the defendant. *Wenona Coal Co. v. Holmquist*, 152 Ill. 581.

Granting that, as alleged in the declaration, the operator of the elevator was not a fellow-servant of the plaintiff, the

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evidence shows that the plaintiff carelessly contributed to the injury, and the jury should have found exactly as they were instructed by the court to find.

There was no error committed and the judgment is affirmed.

John W. Buckley v. Arthur B. Jones.

1. ATTORNEY'S FEES—*In Foreclosure Suits.*—When a mortgage or trust deed in the nature of a mortgage, provides for the payment of an attorney's fee in case of a foreclosure, it is proper to enter the same in the decree.

Foreclosure.—Trust deed in the nature of a mortgage. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Submitted at the March term, 1895, of this court. Reversed and remanded with directions. Opinion filed April 22, 1895.

SAWIN & VANDERPLOEG, attorneys for appellant.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee obtained a decree of foreclosure against the appellant for \$6,035.63, from which this appeal was taken.

The justice of the decree is not questioned, except as to the amount of \$198.45, \$16 of which is a mistake in mathematics, and the residue a mistake allowing items said to be not properly chargeable. The appellee does not appear in this court.

On two items amounting to \$32.45, we will waste no space. Another of \$150 is for attorney's fees, for which the trust deed in the nature of a mortgage provided as follows: "And out of the proceeds of any such sale, to first pay the costs of said suit, all costs of advertising, sale and conveyance, including the reasonable fees and commissions of said party of the second part, or person who may be appointed to execute this trust, and \$150 attorney's and solicitor's fees, and all other expenses of this trust, including all moneys advanced for insurance, taxes and other liens or

assessments, with interest thereon at seven per cent per annum, then to pay the principal of said note," etc.

In *Telford v. Garrels*, 132 Ill. 550, language, such as is here quoted, is held to justify the inclusion of the fees in the decree.

The decree is reversed and the cause remanded with directions to enter a decree for the amount of principal and interest that may be due according to the terms of the note secured by the deed, and \$150 attorney's fees.

The appellant recovers his costs in this court.

Joshua Hutchinson v. David Davis.

1. **IMPRISONMENT FOR DEBT—*Constitutional Provisions.***—The constitution of this State does not permit imprisonment for a mere neglect to pay a debt.

2. **INNKEEPERS—*Frauds upon.***—In construing the act to define and punish frauds upon hotel, inn, boarding and eating-house keepers, a construction which renders the act obnoxious to the provisions of the constitution relating to imprisonment for debt, should be avoided.

3. **FRAUDS UPON INNKEEPERS—*Construction of the Law.***—Proof that a person refused or neglected to pay for accommodation at an inn or hotel on demand, is only proof that he refused or neglected to pay a debt, without showing either that it was fraudulently incurred, or that the neglect or refusal to pay was in any way fraudulent.

4. **SAME—*Essentials of the Proof.***—To constitute the *prima facie* proof under section 2 of the act to define and punish frauds upon hotel, inn, boarding and eating-house keepers, there must be proof that the person surreptitiously removed or attempted to remove his baggage, or of one or more of the conditions required by said section.

5. **CONSTITUTIONAL LAW—*Construction of Statutes.***—A declaration in a statute that mere neglect to pay a debt of a particular kind is a misdemeanor and punishable by imprisonment, will not make confinement under it anything else than imprisonment for debt and in violation of the constitution.

6. **PENAL STATUTES—*Strict Construction.***—The act entitled "An act to define and prevent frauds upon hotel, inn, boarding and eating-house keepers," is a penal statute, and is to be strictly construed.

Trespass, for false imprisonment. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

Hutchinson v. Davis.

STATEMENT OF THE CASE.

This appeal is from a judgment for alleged malicious prosecution. Appellant, Hutchinson, was the proprietor of the Hotel Gresham; appellee became a boarder at such hotel. On the day before May 6, 1893, appellant rendered to appellee a bill for \$27. Appellant understood that appellee was about to leave. On the next day, Saturday, May 6, 1893, at about seven or half past seven o'clock in the evening, he removed his baggage from the hotel. Neither appellant nor his agents saw him go and did not know he was at that time going. After he had so left, he then came back and saw appellant's wife. She told him that the \$27 mentioned in the bill was partly for board and partly for coal, heat, fire, etc. He denied that there was that much due. He told her that he would pay her \$13 only, if given a receipt in full, and upon being told that he should pay all, refused. On May 8th, appellant called on appellee at his place of business to collect the bill. He gave appellant \$13, and the appellant gave him a receipt for that much on account of the bill, whereupon appellee demanded a receipt in full and refused to pay the balance. Thereupon appellant went to the office of justice of the peace H. B. Brayton, and sued out a civil process against appellee for the balance of his bill, and after talking to Brayton, and disclosing to him the principal facts of the case, on the advice of Brayton sued out a warrant under a section of the statute which Brayton told him applied to the case. On the civil process judgment was rendered against appellee for the balance, and appellant compromised the judgment with appellee, and took but six dollars and a half of it. On the warrant appellee was arrested, taken to Brayton's office, detained there a short time, awaiting bail; he gave bail, went back to his place of business and has worked there ever since. Appellee was discharged by Brayton. Appellee then brought his action, and has recovered the sum of \$275.

APPELLANT'S BRIEF, HIRAM BLAISDELL, ATTORNEY.

Actions for malicious prosecution are regarded by law

with jealousy. Lord Holt said more than one hundred years ago, that "they ought not to be encouraged, but managed with great caution." Their tendency is to discourage prosecution for crime, as they expose the prosecutors to civil suits, and the love of justice may not always be strong enough to induce individuals to commence prosecutions, when, if they fail, they may be subjected to the expense of litigation if they be not mulcted in damages. Newell on Malicious Prosecution, page 13; *Israel v. Brooks*, 23 Ill. 527; *Harpham v. Whitney*, 77 Ill. 39; *Ames v. Snyder*, 69 Ill. 379; *Collins v. Hayte*, 50 Ill. 354; *Palmer v. Richardson*, 70 Ill. 545.

It is a rule of law founded on policy, convenience, justice and necessity, that the prosecutor of a wrong that affects the public shall be protected, provided he has probable cause, however malicious his private motives may have been, for although he may have intended ill, still good may arise to the public. Newell on Malicious Prosecution, 15; *Collins v. Hayte*, 50 Ill. 355; *Anderson v. Friend*, 71 Ill. 479; *Palmer v. Richards*, 70 Ill. 546; *Thomas v. Smith*, 51 Mo. App. 605; 1st T. R. 493; *White v. Dingley*, 4 Mass. 433; *Lindsay v. Larned*, 17 Mass. 190; *Vanduzor v. Kindermon*, 10 Johns. 106; 2 Stark. Ev. 911; 2 Saund. P. L. & Ev. 195.

An agreement with an innkeeper for the price of board by the week, is not decisive that the relation is that of boarder instead of guest. *Burkeshire Woolen Co. v. Proctor*, 7 Cushing 417, 424; *Story on Bailments*, Sec. 477; *Hancock v. Rand*, 94 N. Y. 1; *Pinkerton v. Woodard*, 33 Calif. 557; *Walling v. Potter*, 35 Conn. 383; *Ross v. Mellin*, 32 N. W. Rep. 172; *Shoecraft v. Bailey*, 25 Iowa 553.

APPELLEE'S BRIEF, ROYER, PARKER & HIGGINS, ATTORNEYS.

The appellee was obliged to show on the trial that the prosecution was malicious, and without probable cause, but he was not required to show malice by direct expressions of actual ill will or hatred on the part of the appellant. *Harp-*

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ham v. Whitney, 77 Ill. 32; Krug v. Ward, 26 Ill. 603; Calef v. Thomas, 81 Ill. 432.

Malice may be inferred from proof of want of probable cause. Ray v. Goings, 112 Ill. 656; Beidler v. Biernaest, 25 Ill. App. 422; Mitchinson v. Cross, 58 Ill. 366.

The prosecution of a person criminally with any other motive than bringing the guilty party to justice, is in law a malicious prosecution. Ross v. Inniss, 35 Ill. 487; Schofield v. Feners, 47 Pa. St. 196; Anderson v. Friend, 71 Ill. 475.

To constitute reasonable or probable cause that will excuse one from liability to pay damages, if the accused is not guilty, there must be a reasonable ground to believe the guilt of the accused, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused is guilty of the offense with which he is charged, and the prosecutor must act in good faith, believing them to be true. Roy v. Goings, 112 Ill. 657.

In determining whether there was reasonable or probable cause to believe the guilt of the accused, his good character, as bearing on the probability of his being likely to commit such an offense, must be considered. Israel v. Brooks, 23 Ill. 575; Krug v. Ward, 77 Ill. 164; Ross v. Innis, 35 Ill. 487.

The appellee was not a guest at an inn in the meaning of the statute; he was a boarder at a boarding house. Moore v. Long Beach Development Co., 83 Cal. 483; 62 American Decisions, 586.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is urged by appellant that under the following provisions of the statute of this State, he was justified in causing the arrest of appellee, and that this action can not be maintained.

Page 357 of the 3d volume of Starr & Curtis: "An act to define and punish frauds upon hotel, inn, boarding and eating-house keepers."

"Sec. 1. That any person who shall obtain food, lodging or other accommodation at any hotel, inn, boarding or eating-house, with intent to defraud the owner or keeper thereof, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding \$100, or imprisonment in the county jail not exceeding thirty days."

"Sec. 2. Proof that lodging, food or other accommodation was obtained by false pretense, or by false or fictitious show or pretense of baggage, or that the party refused or neglected to pay for such food, lodging or other accommodation on demand, or that he or she absconded or left the premises without paying or offering to pay for such food, lodging, or other accommodation, but that he or she surreptitiously removed or attempted to remove his or her baggage, shall be *prima facie* proof of the fraudulent intent mentioned in section 1 of this act, but this act shall not apply to regular boarders, nor when there has been an agreement for delay in payment."

In construing this statute, it must be borne in mind that the constitution of this State does not permit imprisonment for a mere neglect to pay a debt, and that to construe these sections in such manner as to make them authority for such imprisonment, would be to render them obnoxious to the constitution.

Such a construction is not to be sought, but avoided. Mere proof that one refused or neglected to pay for accommodation on demand would be, only, that one refused or neglected to pay a debt, without showing either that it was fraudulently incurred, or that the neglect or refusal to pay was in any way fraudulent. We must not hastily conclude that the legislature intended to create a statute providing that one who owed a hotel bill might be imprisoned for non-payment thereof.

The declaration in a statute that mere neglect to pay a debt of a particular kind should be a misdemeanor and punishable by imprisonment, would not make confinement under such enactment anything else than imprisonment for

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debt and in violation of the constitution. It is evident that to constitute the *prima facie* proof described in section 2 of the act, there must be proof that he or she surreptitiously removed or attempted to remove his or her baggage, as well as of one or more of the facts mentioned in that part of the section preceding the word "but." There was no evidence that appellee "surreptitiously removed" his baggage from appellant's hotel.

The fact that neither appellant nor any of his agents knew that he was going away, or taking his baggage away, does not, of itself, establish that the removal was surreptitious. He may have gone and taken his baggage in the most open and public manner, and yet neither appellant nor any of his agents seen the removal.

There was no evidence that appellee absconded at all, or left the premises without offering to pay for such food, lodging and other accommodations.

He left without offering to pay the amount appellant claimed was due; he did offer to pay, and did pay the sum he insisted was due. It does not appear that the difference of opinion as to what was due, was upon the part of appellee a mere fraudulent pretense; he seems to have honestly thought that he did not owe \$27. Quite likely he was, as Justice Brayton found, mistaken as to this; but the circumstances were such that it was a mistake, which one could honestly make.

The statute under consideration is a penal one and is to be strictly construed.

Appellant made written complaint that appellee, on the 6th day of May, 1893, did, with intent to cheat and defraud the affiant, Joshua Hutchinson, obtain from him food and lodging to the amount of \$27.36. There was no evidence to sustain this complaint. Appellee did not obtain either food or lodging on the 6th day of May, to the amount of \$27.36; he left the evening of that day and boarded with appellant no more. Nor was there any sufficient evidence that either the food he had on that day or at any previous time he obtained with intent to cheat or defraud the "affiant, Joshua Hutchinson."

It is gratifying to note that the jury did not, in this case, allow their reason and judgment to be run away with.

Appellant made a serious mistake; had he before causing the arrest of appellee consulted with a capable lawyer and told him all the facts, it is not likely that he would have instituted the criminal proceedings.

The verdict is, under the circumstances, for a fair and just amount. The judgment of the Circuit Court is affirmed.

John W. Buckley v. Simeon B. Eisendrath, Commissioner of Buildings, and the City of Chicago.

1. **PLEADING**—*Ordinances of Cities—Conclusions.*—In pleading an ordinance of a city and acts of compliance therewith, the ordinance and the acts of compliance therewith should be set out, and not the conclusions of the pleader.

2. **MANDAMUS**—*The Right to the Writ Must be Clear.*—The writ of mandamus will not be issued where the right to what is claimed is doubtful.

Mandamus.—To compel the issuing of a building permit. Appeal from the Circuit Court of Cook County: the Hon. EDWARD F. DUNNE, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

STATEMENT OF THE CASE.

Appellant filed his amended petition for mandamus in the Circuit Court of Cook County, making Simon B. Eisendrath, commissioner of buildings of the city of Chicago, and the city of Chicago, parties defendant, praying a writ of mandamus directed to Eisendrath as commissioner of buildings of the city of Chicago, and the city of Chicago, commanding Eisendrath to apply to certain plans and specifications his official stamp, and upon payment of certain fees and charges, or the tender thereof, to issue to the petitioner a permit to erect a building, and commanding the city of Chicago, by its proper officer, to receive, accept and receipt for the fees to be paid for the use of the water to be

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used in the erection of the building, and for the permit to be issued for the erection of the same.

The defendants filed separate special demurrers to the petition. The court sustained the demurrers to the petition, and rendered judgment against the petitioner for costs.

SAWIN & VANDERFLOEG, attorneys for appellant.

APPELLEES' BRIEF, JOHN MAYO PALMER, CORPORATION COUNSEL; ASHCRAFT, GORDON & COX, ATTORNEYS.

The writ of mandamus is only issuable in a clear case and in the discretion of the court. *People v. Forquer*, 1 Breese, 109; *People v. Curyea*, 16 Ill. 547; *People v. Kilduff*, 15 Ill. 501, 502; *Tapping on Mandamus*, 165, 166; *People v. Lieb*, 85 Ill. 490; *Brokaw v. Commissioners*, 130 Ill. 492; *North v. Trustees*, 137 Ill. 301.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The petition, while stating that the petitioner is the owner of a certain lot and that he desires to improve the same, fails to allege that he applied to the defendant Eisendrath for a permit to erect a building upon that or any other particular lot.

The petition does not purport to set forth all of the ordinances of the city of Chicago relative to the erection of buildings therein, but alleges that he, the petitioner, has complied with all and every one of the requirements of the ordinances of said city relative to the erection of buildings therein.

This is but the statement of a conclusion. Acts of compliance should be set forth, not his conclusion that he has complied. Nor is it sufficient in pleading an ordinance to allege that its substance is so and so. That is but stating a conclusion of the pleader. The ordinance, or so much thereof as is relied upon, should be set forth.

From so much of the building ordinances as is set forth in the petition, it is manifest that the building commissioner is to judge as to whether the plans and specifications de-

scribe such a building as the ordinances permit the erection of. Where it is alleged that the commissioner has abused his discretion by a refusal to approve plans which it was his duty to approve, such plans should be clearly set forth in the petition. The plans and specifications should be such as make it plain that a refusal to accept the same was a wanton abuse of power; for this purpose the place at which the building is to be erected should be specified with such distinctness as to leave no room for doubt.

The writ of mandamus will not be issued where the right to what is claimed is doubtful. *People v. Forquer*, 1 Breese, 109; *People v. Curyea*, 16 Ill. 547; *People v. Kilduff*, 15 Ill. 501, 502; *Tapping on Mandamus*, 165, 166; *People v. Lieb*, 85 Ill. 490; *Brokaw v. Commissioners*, 130 Ill. 492; *North v. Trustees*, 137 Ill. 301.

We do not think that appellant has made it plain that the writ should be awarded to him.

The judgment of the Circuit Court is affirmed.

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George P. Harris et al. v. Coleman & Ames White Lead Company et al.

1. *CONTRACTS—Construction of.*—In construing a contract, every word should, when possible, have assigned to it some meaning.

2. *PROMISSORY NOTES—"I or We" Construed.*—In the following promissory note :

"Sixty days after date I or we promise to pay to the order of Geo. P. Harris & Bro., one thousand dollars, with interest at seven per cent per annum from date.

COLEMAN & AMES WHITE LEAD CO.,

Per C. I. WILLIAMS, Sec.,

GEORGE J. WILLIAMS, Genl. Mangr."

"I or we" does not mean that "I" will pay if "we" don't, but "we" is used as the pronoun meaning the corporation, while "I" means Williams, and "or" is to be construed as "and."

Assumpsit, on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Submitted at the March term, 1895. Reversed and remanded. Opinion filed April 22, 1895.

Harris v. Coleman & Ames White Lead Co.

EDWIN F. ABBOTT, attorney for appellants.

SLUSSER & JOHNSON, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is a suit against George J. Williams, as well as the White Lead Co., upon a promissory note as follows:

“\$1,000. CHICAGO, March 7, 1893.

Sixty days after date I or we promise to pay to the order of Geo. P. Harris & Bro., \$1,000, with interest at seven per cent per annum from date, at 218 1st Nat'l Bk. Bldg.

COLEMAN & AMES WHITE LEAD CO.

COLEMAN & AMES

Per C. I. WILLIAMS, Sec.

[SEAL.]

GEORGE J. WILLIAMS,

WHITE LEAD CO.,

Gen'l Mangr.

Chicago, Ill.”

That it is the note of the company is not questioned, but upon demurrer to the declaration the court held that it was not the note of Williams.

Such a holding rejects the “I,” contrary to the rule that in a contract “every word should, when possible, have assigned to it some meaning.” Bishop Cont., Sec. 384.

“I or we” does not mean that “I” will pay if “we” don't, but “we” is used as the pronoun meaning the corporation, while “I” means Williams, and “or” is to be construed as “and.” No other construction, giving effect to all the words, is possible.

It thus becomes a joint and several note, joint by the words and several by the statute. See cases cited in National Bank of Oshkosh v. Jennings Trust Co., 44 Ill. App. 285. This decision is based upon the case as it comes to us. Whether extrinsic evidence can affect the result is not before us.

The judgment is reversed and the cause remanded.

Tennent-Stribbling Shoe Company v. The Hargardine-McKittrick Dry Goods Company, William C. Gilbert and The German American Insurance Company.

1. **SERVICE OF PROCESS—Defective Return—How Cured.**—A defect in the service of garnishee process is cured by the appearance and answer of the garnishee.

2. **SAME—Upon Assistant Manager.**—An assistant manager of a corporation is *ex necessitate* an agent, and service of process upon him in the absence of the president from the county by leaving a copy of the process, is sufficient.

3. **GARNISHEE PROCESS—Service of, in Attachment Proceedings.**—It is not necessary that garnishee process in attachment proceedings should be served before judgment is rendered against the principal defendant.

4. **ATTACHMENT PROCEEDINGS—Are in Rem.**—Attachment proceedings are *in rem*; the judgment against the principal defendant, where there is neither personal service nor appearance by him, is not *in personam*, but merely against him to the extent of his interest in the property attached. And if no property in which the defendant is interested is attached, the suit fails.

5. **SAME—What Gives the Court Jurisdiction.**—It is the seizing of property in which the principal defendant has an interest that gives the court jurisdiction.

6. **SHERIFF'S RETURN—Amendment of, After Appeal.**—A sheriff has power to amend his return so as to make the same correspond with the facts, and such amendment may be made after a cause has been appealed.

Attachment and Garnishee Proceedings.—Appeal from the Superior Court of Cook County: the Hon. JOHN BARTON PAYNE, Judge, presiding. Submitted at the March term, 1895. Affirmed. Opinion filed April 22, 1895.

APPELLANT'S BRIEF, CRATTY BROS., MACLAREN, JARVIS & CLEVELAND, ATTORNEYS.

Creditors attaching the same fund or property may attack the validity of claims or judgments of each other on the question of distribution. *Culver v. Rumsey*, 6 Ill. App. 598; *Brewster v. Riley*, 19 Ill. App. 581.

In attachments, where service is had by publication, jurisdiction must appear from the record; it is not presumed.

Firebaugh v. Hall, 63 Ill. 81; Hayward v. Collins, 60 Ill. 328.

In attachment proceedings, service by publication, either property of the defendant must be levied upon or garnisheed. The existence of one of these conditions is jurisdictional. Clymore v. Williams, 77 Ill. 618; Lord v. Babel, 16 Ill. App. 434; Martin v. Dryden, 1 Gilm. 187; 8 Am. & Eng. Ency. of Law, 1126, "Return;" same page, 1118, title "Service," and note 2, page 1119.

Service of the writ must be as provided by law. The service on a corporation without a recital that the president was not found in the county is a nullity. St. Louis & Alton and T. H. R. Co. v. Dorsey, 47 Ill. 288; Cairo & Vincennes R. R. Co. v. Joiner, 72 Ill. 520; St. Louis & Vandalia & Terre Haute R. R. Co. v. Dawson, 3 Ill. App. 118; Grand Tower Mining, Mfg. & Trans. Co. v. Schirmer, 64 Ill. 106; Wells v. Stumph, 88 Ill. 56; Piggott v. Snell, 59 Ill. 106.

In proceedings *in rem* the court must acquire jurisdiction in the manner provided by law; not by consent of the parties, nor can the statutory course of procedure be waived, except by the debtor whose property is attached. Hayward v. Collins, 60 Ill. 328; 8 Am. & Eng. Enc. of Law, page 1121, title, "Service," and note 1; Hailey v. Hannibal, etc., R., 80 Mo. 112; Habel v. Amazon Ins. Co., 33 Mich. 400.

Amendments will not be allowed to the prejudice of the rights of third parties, judgment or attaching creditors, who have acquired rights that such an amendment would deprive them of. McCormick v. Wheeler, 36 Ill. 114; 1 Black on Judgments, 504, Sec. 410; page 192, Sec. 169; Lea v. Yeates, 40 Ga. 56; Crutcher v. Com., 6 Whart. 340; Legairs, Admr., v. Rogers, 12 Ga. 281; Gaff v. Spellmyer, 13 Ill. App. 294.

APPELLEES' BRIEF, GREEN, ROBBINS & HONORE, ATTORNEYS.

Attachments returnable to the same term of court *pro rata*, no matter when the judgment is recovered. Warren v. Iscarian Com., 16 Ill. 114; Pollack v. Slack, 92 Ill. 221; Jones v. Jones, 16 Ill. 117; Warren v. Iscarian Com., 16 Ill. 114; Smith v. Clinton Bridge Co., 13 Ill. App. 572.

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It is not necessary that the garnishee should be in court at the time when the judgment against the principal defendant is entered. *Toledo Co. v. Butler*, 53 Ill. 323; *Moore v. Purple*, 3 Gil. 149; *Hawes v. Hawes*, 33 Ill. 286; *Spellmyer v. Gaff*, 112 Ill. 29.

A sheriff's return may be amended sixteen years after it is made. *Spellmyer v. Gaff*, 112 Ill. 29; see, also, *Montgomery v. Brown*, 2 Gilm. 581.

Return may be amended after sheriff's term expires. *Morris v. Trustees*, 15 Ill. 266.

Return may be amended by deputy. *O'Connor v. Wilson*, 57 Ill. 226.

Return may be amended after case is in Supreme Court, and even after supersedeas issued. *Ellis v. Ewbanks*, 3 Scam. 584; *Hawes v. Hawes*, 33 Ill. 286; *Toledo v. Butler*, 53 Ill. 323.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee, at the December term of the Superior Court, began attachment suit against W. F. Purteet, summoning the German-American Insurance Company as garnishee; the sheriff's return upon this summons, it is said, is defective.

Granting that it is, we are of the opinion that such defect was cured by the appearance and answer of the garnishee. It is urged that a garnishee can not voluntarily come into court, and thus confer jurisdiction. The garnishee did not voluntarily come into court. Suit was begun and process issued against it; service was had upon it by delivering a copy of the writ to an assistant manager. The office of assistant manager is not one of those specifically mentioned in the statute, in the description of persons with whom, in the case of incorporated companies, a copy of the process may be left. The assistant manager of an incorporated company is *ex necessitate* an agent, and the statute provides that service may be made in the absence of the president, by leaving a copy with any agent.

The service was manifestly of such a character that the garnishee was not, in filing an answer, volunteering to give jurisdiction. It could not know what return the sheriff would make upon the process he had at least attempted to serve upon it. It would have been perilous in the extreme for it to have failed to answer, relying upon either the service or the return being insufficient.

It was not necessary that the garnishee should have been served ere judgment was rendered against the principal defendant.

Attachment proceedings are *in rem*; the judgment against the principal defendant, where there is neither personal service nor appearance by him is not *in personam*, but merely against, to the extent of the interest of such defendant in the *rem*.

If no *rem* is ever laid hold of, or rather if no *rem* in which the principal defendant has an interest is seized, the suit fails; there is no judgment, because there has been laid hold of nothing against which a judgment can be pronounced. A garnishee may be summoned, he may answer, denying that he is indebted to or holds anything for the principal defendant; this answer may be controverted; final judgment upon the seizure thus made may not be had for years; meantime the trial of the question of an indebtedness of the principal defendant is not delayed.

Appellant urges that until it appears by a proper return that the garnishee has been summoned, judgment can not be taken against the principal defendant; by the same course of reason it might be contended that judgment could not be pronounced against the principal defendant until it had been taken against the garnishee.

In the case of a garnishee, service of summons upon him and a proper return thereof does not establish that any *rem* has been laid hold of, *i. e.*, that he owes the defendant anything.

It is the seizing of a *rem* in which the principal defendant has an interest that gives the court jurisdiction. *Smith v. Clinton Bridge Co.*, 13 Ill. App. 572; *Olymore v. Williams*, 77 Ill. 618.

By a supplemental record filed in this cause April 1, 1895, it appears that by order of the Superior Court, entered March 23, 1895, the court permitted the sheriff to amend his return, which he did by making the following return:

"Served this writ on the within named defendant, The German-American Insurance Company, as garnishee, by leaving a true copy thereof with Rogers Porter, who is assistant manager of said company, and who is an agent of said company, this 24th day of November, 1893, not having been able to find the president of said company in my county. The within named defendant, W. F. Purteet, not found in my county.

JAMES H. GILBERT, Sheriff,

By C. J. MANVEL, Deputy."

A sheriff has power to amend his return, so as to make the same correspond with the facts. *Spellmyer v. Gaff*, 112 Ill. 29; *Morris v. Trustees*, 15 Ill. 266; *O'Connor v. Wilson*, 57 Ill. 226.

Such amendment may be made after a cause has been appealed. *Ellis v. Ewbanks*, 3 Scam. 584; *Hawes v. Hawes*, 83 Ill. 286; *Toledo v. Butler*, 53 Ill. 323.

The judgment of the Superior Court is affirmed.

W. W. Huntington, Trustee, v. William G. Metzger.

1. PRACTICE—*Stay of Proceedings Pending Suit in Another State.*—A person recovered a judgment in the Circuit Court of Indiana, and afterward sued upon and recovered a judgment upon the same in the Circuit Court of Cook County, after which the judgment of the Circuit Court of Indiana was reversed by the Supreme Court of that State. Upon a bill to enjoin the collection of the judgment in the Circuit Court of Cook County, *it was held* proper to stay proceedings under the same until the determination of the original suit pending in the Indiana court.

Bill to Enjoin Collection of a Judgment.—Error to the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Huntington v. Metzger.

Heard in this court at the March term, 1895. Reversed and remanded with directions. Opinion filed April 22, 1895.

STATEMENT OF THE CASE.

A judgment was recovered in favor of the plaintiff in error against the defendant in error, in the Circuit Court of Miami County, in the State of Indiana, on the 4th day of March, 1893, for the sum of \$26,123.80. An appeal was prayed from the Circuit Court of Miami County to the Supreme Court of Indiana.

Before a supersedeas bond was filed, the plaintiff in error, Huntington, procured a transcript of said judgment in Miami county, Indiana, and on April 6, 1893, commenced his suit in the Circuit Court of Cook County, based upon said transcript only, and on the 9th of June, 1893, by virtue of said transcript of judgment from Indiana, procured a judgment against the defendant in error for \$26,483.48 and costs.

On the 22d day of June, 1894, the Supreme Court of Indiana decided said original action in favor of the defendant in error, Metzger, and reversed the judgment in the Circuit Court of Miami County. A petition for rehearing was filed by the plaintiff in error, Huntington, and on December 14, 1894, said Supreme Court of Indiana overruled said motion for rehearing and reaffirmed its judgment of June 22, 1894, and the original judgment rendered in Miami Circuit Court on March 4, 1893, was vacated, annulled, canceled and set aside.

This is a bill in chancery, setting up the foregoing, and praying that the judgment rendered in the Circuit Court of Cook County may be annulled, and the plaintiff in error enjoined from enforcing it. Service was had upon the plaintiff in error, Huntington, who, by his counsel, filed a demurrer. The demurrer was overruled, and this is a writ of error sued out, assigning the overruling of said demurrer as error.

There was in the bill in this case no allegation that the suit or controversy upon or concerning which the judgment in Indiana was obtained, had been finally terminated.

BRIEF FOR PLAINTIFF IN ERROR, DEFREES, BRACE & RITTER,
ATTORNEYS.

Equity is not concerned about a judgment which, though irregular, is, in fact, equitable and just. *Gifford v. Morrison*, 37 Ohio St. 502.

A party seeking to enjoin or annul a judgment has no standing in a court of equity without an allegation of meritorious defense. *Ibid.*, page 506.

He must show that the judgment is wrong, that he did not owe the debt for which it was rendered, or that he has offered to pay it, before he asks the aid of a court of equity. He must do equity as the condition upon which he asks equity. *Williams v. Hitzie*, 83 Ind. 309.

If a party can say nothing against the justice of a judgment, can give no reason why, in equity, he ought not to pay it, a court of equity will not interfere, but will leave him to contend against it at law in the best way he can. *Stokes v. Knarr*, 11 Wis. 389; cited and approved in *Williams v. Hitzie*, 83 Ind. 309; also in *Burch v. West*, 134 Ill. 258.

Equity can not relieve against the operation of a judgment simply on account of its hardship. It must first of all appear that it would be unjust and against conscience to enforce the judgment. 1 Black on Judgments, Sec. 365.

It must be shown that if a new and fair examination of the merits be had, the result will be other than already reached. *Taggart v. Wood*, 20 Ia. 236; *Sauer v. Kansas*, 69 Mo. 46.

Where a court of equity proceeds to enjoin a judgment at law, it does so on equitable considerations only. *Hartford Fire Ins. Co. v. Meyer*, 46 N. W. Rep. 292.

If a judgment is not inequitable as between the parties, however irregular the proceedings may have been, equity will not prevent its enforcement. 1 Beach on Injunctions, Sec. 673.

Even a judgment fraudulently procured can not be enjoined unless the person against whom it is rendered can

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aver and prove that he has a good defense upon the merits. *White v. Crow*, 110 U. S. 183.

It must appear that on a re-examination and a re-trial of the cause, the result would probably have been different. *Hartford Fire Ins. Co. v. Meyer*, 46 N. W. Rep. 292.

Equity will not overturn a judgment, valid on its face, unless it is shown an unjust judgment. *Harnish v. Bramer*, 71 Cal. 155.

L. H. BISBEE, attorney for defendant in error.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The decree rendered by the Circuit Court upon the overruling of the demurrer, was that the judgment be "canceled, vacated, annulled and forever released," and that the clerk of the court enter upon the judgment docket a statement that said judgment has been canceled, annulled and vacated, and that said Huntington be perpetually enjoined from taking any steps toward collecting said judgment.

There is a manifest difference between the case of *McJilton v. Love*, 13 Ill. 486, in which it appeared that it had been determined by the Supreme Court of the State of Missouri, that the entry of satisfaction on the docket of the judgment should stand, and the present, in which a judgment has been merely set aside, leaving, so far as appears, the suit in which it was entered still pending.

We do not at present express any opinion upon any question in this case, other than that arising from the decree.

Under the circumstance of, so far as appears, the pending of the original suit in Indiana, the most that should be done here would be to stay proceedings under the Illinois judgment until the determination of the Indiana suit, if such there be.

The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion. Reversed and remanded with directions.

Catholic Order of Foresters v. Edward Fitzpatrick.

1. **BENEVOLENT INSURANCE—Forfeitures—Notice.**—Where the assessments of a benevolent insurance society do not occur at stated intervals, of which the members are bound to take notice, in order to insist upon a forfeiture of a member's rights for a failure to pay an assessment, it must be shown that notice of such assessment was given as provided by the by-laws.

Assumpsit, upon a certificate of a benevolent insurance society. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Submitted at the March term, 1895. Affirmed. Opinion filed April 22, 1895.

E. S. CUMMINGS, attorney for appellant.

APPELLER'S BRIEF, KAVANAGH & O'DONNELL AND F. T. COLBY, ATTORNEYS.

The giving of notice is a condition precedent, and good standing is not lost by a failure to pay an assessment, of which no notice was given through the fault or misconduct of a supreme lodge or society, or its officer. *Niblack, Ben. Soc.* (2d Ed.) 257; *Hall v. Sup. Lodge K. of H.*, 24 Fed. Rep. 450; *Covenant Mut. v. Spies*, 114 Ill. 463.

A member is entitled to notice of an assessment before he can be declared in default for his non-payment. *Supreme Lodge v. Dalberg*, 138 Ill. 508.

The giving of the notice being a condition precedent, the facts showing that the notice provided by the contract of insurance has been given should be set out in pleading and proved at trial. *Coyle v. Kentucky Granger (Ky.)*, 2 S. W. Rep. 676.

Where notice through mails is relied on, it must clearly be shown, both in pleading and evidence, that the communication was placed in the postoffice, properly directed, and stamped according to law. *N. W. Association v. Sehauss*, 148 Ill. 304.

Where the only means which a subordinate lodge or a

Catholic Order of Foresters v. Fitzpatrick.

member of a benefit association has of knowing when an assessment is due to the order or association, is by a notice from the supreme lodge or governing body, unless notice is given, no rights are lost. When in the contract a notice is provided for and not given, no tender of the amount of any assessment is necessary in order to prevent a forfeiture of membership. A member is entitled to notice of an assessment, before he can be declared in default for his non-payment. *Hall v. Supreme Lodge*, 24 Fed. Rep. 450; *Covenant Mut. v. Spies*, 114 Ill. 463; *Supreme Lodge v. Dalberg*, 138 Ill. 508.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered upon a certificate issued by a benevolent insurance society.

The defense to the action was that the insured, Hugh Fitzpatrick, had by failure to pay assessments forfeited his membership.

Sections 4, 5, 7, 8, of article 11, and section 4 of another article of the constitution and by-laws of the order are as follows :

“SEC. 4. In order to avoid delay in the payment of the sum due the beneficiaries of a deceased member, the High Court shall make an assessment per capita of every member of the courts subject to assessment for such purpose, with the provision mentioned in section 2 of this endowment law; and after the payment of such sum at the death of a member they shall make a similar assessment, so as to have always on hand the requisite amount for a similar purpose.

SEC. 5. Each subordinate court receiving the notice of such an assessment made by the High Court shall forward within fifteen days to the High Treasurer the sum required.

SEC. 7. Any member suspended or expelled from the order for any cause whatever, forfeits all claim to the endowment fund during his suspension or expulsion.

SEC. 8. When the subordinate court shall have paid the

death assessments called for by the H. C., which shall be paid on the order of C. R. and secretary, and reported at next meeting, then the court shall at once call on the members to pay the amount of one assessment, equal to the last one, into the court treasury, so as to keep one assessment always on hand, except when the court treasury has an amount equal to an assessment over and above the sum of \$5 for each member of the court in good standing, then the surplus can be applied to the payment of the endowment.

SEC. 4. The financial secretary shall keep an account of the indebtedness of each member, with the amount received from each, and at the close of each meeting he shall pay the same over to the treasurer, taking his receipt therefor. He shall immediately, on receipt of same, mail the notice of endowment and special assessments to each member, to the latest address furnished by the member. At the date when a member becomes in arrears he shall notify the recording secretary and the High Secretary of the same."

Section 1 of article 9 is as follows:

ARTICLE IX.

SUSPENSION AND REINSTATEMENT.

"Section 1. Any member in arrears for endowment, regular or special assessment, dues or fines, shall not be entitled to or receive the pass-word or other privileges of the order, nor to vote, or speak on any question, or be eligible for any office, or receive any benefit from the court, and if he fails to pay such arrears for the space of one month, except such arrears be for endowment assessment, which must be paid by the last day of the month following the month in which the assessment was called, he shall stand suspended from the order; and it is hereby specially ordered that regular dues are payable on the first meeting night after the time specified in the call for same."

It is clear that under the provisions of section 8, before any member can be in arrears for an assessment, he must have been called upon to pay the same. And it is equally clear that before the certificate of a member can be

Chladek v. Brown.

forfeited or he be suspended so as to lose the benefit of his membership for non-payment of an assessment, he must have had notice of such call.

It does not appear that Hugh Fitzpatrick had notice that any call for the payment of the assessments which he failed to pay had ever been made.

These assessments were not a thing occurring at stated intervals of which he was bound to take notice.

There is nothing to show that he knew that any of these assessments had been made.

It was the duty of the financial secretary to mail to the latest address of each member notice of each assessment. It does not appear that any such notice was ever mailed to or received by Hugh Fitzpatrick.

He could not have been, under such state of facts, properly suspended. *Covenant Mut. v. Spies*, 114 Ill. 463; *Supreme Lodge v. Dalberg*, 138 Ill. 508; *Niblack, Ben. Soc.* (2d Ed.), 257.

The judgment of the Circuit Court for the amount of the insurance to Hugh Fitzpatrick is therefore affirmed.

Joseph W. Chladek v. Andrew J. Brown.

1. **STATUTORY BONDS**—*Construction of.*—A statutory bond has the effect which, in reason, must have been intended by the statute.

Debt, on an appeal bond. Appeal from the Superior Court of Cook County; the Hon. HENRY W. FREEMAN, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

GEORGE G. BELLOWES, attorney for appellant.

EASTMAN & SCHUMACHER, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
This is an action upon an appeal bond given in the County

Court of Cook County upon an appeal from a judgment of that court to this, in an action of forcible detainer, and conditioned as the statute requires.

This case was tried without a jury, and on the trial it appeared that this court affirmed the judgment of the County Court.

The Superior Court assessed the damages at \$795. The evidence warranted the finding, and we are too much pressed with real questions, to review the argument of the appellant on his thirteen assignments of error.

The judgment is affirmed.

MR. JUSTICE GARY ON PETITION FOR REHEARING.

We are urged to reconsider the question of the sufficiency of the evidence as to the amount of damages. This we decline to do. We do not regard it to be necessary in deciding that a court or jury made no mistake upon evidence, to recite the evidence.

It is further urged that we did not consider the construction of the bond conditioned *inter alia* to pay "all damages and loss which plaintiff may sustain by reason of the withholding of the premises, and by reason of any injury done thereto." As we read the argument the appellant holds that, unless the damages and loss sued for are the result, both of withholding and of injury done, there can be no recovery.

A statutory bond has the effect which, in reason, must have been intended. *Hibbard v. McKinley*, 28 Ill. 240.

Petition denied.

Edwin D. Weary v. A. H. Andrews & Co.

1. CHANCERY PRACTICE—*Master to State an Account*.—Under a bill for a discovery and an accounting as to moneys alleged to have been fraudulently received, the proper practice is to refer the same to the master to take the testimony and state the account. A reference to take the testimony only will not do.

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2. *SAME—Stating an Account.*—A solicitor can not throw upon the court the clerical and accountant labor of going through accounts, by a reference to a master to take and report the testimony alone. The objection to such a course is one which a court will, of its own motion, interpose for its protection from unnecessary labor sought to be imposed upon it.

Bill for Discovery and Accounting.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Submitted at the March term, 1895, of this court. Reversed with directions. Opinion filed April 22, 1895.

EDWARD R. WOODLE, attorney for appellant.

REMY & MANN, attorney for appellee.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was a bill for a discovery from and an accounting by appellant as to money it was alleged he had fraudulently received and failed to account for in respect to the business of appellee while he was in its employment.

The defendant denying all fraud, and that the complainant was entitled to any of the moneys received by him, admitted having received certain moneys collected by the complainant. There was a reference to a master to take testimony. Testimony was taken by the master upon the subject of moneys received by appellant and his liability to account therefor.

The master reported the evidence without stating an account. From the testimony so reported, the Circuit Court made up an account and ordered the appellant to pay to the appellee \$1,339.40. The cause should have been referred to a master to state an account.

In the manner in which the suit was disposed of, two courts have already been called upon to go through the entire mass of testimony, sift therefrom what is material and make the necessary calculations to arrive at a true account. This is not the business of a chancellor. Solicitors are not entitled to throw upon a chancellor the clerical and accountant labor of going through accounts; this court has not the time for

such work. The practice, here presented, has been repeatedly condemned by the Supreme Court, and the decree herein rendered is reversed and the cause remanded with directions to refer the same to a master to take and state an account between the parties and report the same to the court. *Huling v. Farwell et al.*, 33 Ill. App. 238; *Moss v. McCall*, 75 Ill. 190; *French v. Gibbs*, 105 Ill. 523; *Beale v. Beale*, 116 Ill. 292.

The objection here made is one which a court will of its own motion interpose for its protection from unnecessary labor sought to be imposed upon it. Useful forms of orders of reference in such cases can be found in Vol. 3, page 2193, of *Daniell's Chancery Practice*; attention is specially called to notes "b" and "f" as likely to be saving of time to the court and expense to parties.

We also call attention to what is said concerning the proper practice in *Huling v. Farwell*, *supra*; *Heffron v. Gore*, 40 Ill. App. 257-265; *Brown v. McKay*, 51 Ill. 295-299; *Hodson et al. v. Eugene Glass Co.*, 54 Ill. App. 248. Reversed with directions.

Anna Wiedeman v. Henry Keller.

1. **WARRANTY—Vendor of Provisions.**—When a vendor of provisions has no notice, and can not by the exercise of reasonable or ordinary care ascertain the unwholesome or unsound condition, there is no implied warranty of the soundness of provisions not prepared or manufactured by such vendor.

Trespass on the Case.—Sale of unwholesome pork. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

RUFUS KING, attorney for appellant.

PRUSSING & McCULLOCH and CATHARINE WAUGH McCULLOCH, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The principal question discussed by counsel in this case is whether a regular retail dealer in provisions for consumption must be held to warrant that the goods he so sells are sound and wholesome, notwithstanding the defective character of the articles is unknown to him and could not have been discovered except by the use of extraordinary care, and notwithstanding that the goods so sold had been duly inspected by an officer of the health department of the city of Chicago and pronounced free from taint; the vendee having selected from a mass, the article sold.

This action is based upon injury said to have arisen from eating pork containing trichina. There is no evidence that appellee omitted any reasonable or ordinary precaution or did anything that is unusual; while it is established that he did exercise reasonable and ordinary care in the purchase and sale of all meat sold by him.

There can be found in text books and opinions, expressions indicating a belief that the retail vendor of provisions for consumption impliedly warrants that they are sound and wholesome.

Such expression is doubtless a statement of a rule to which there are important exceptions: 1st. When the defect is clearly obvious. 2d. When the purchaser is informed of the defect.

To these may be added, not so much as an exception, but as a statement of a contract which by its terms negatives the idea of such a warranty, the following: "When the vendor and vendee, equally, rely upon the brand of the inspector."

There are many authorities holding that when the vendor has no notice, and could not by the exercise of reasonable or ordinary care, have ascertained the existence of the unwholesome or unsound condition, there is no implied warranty of the soundness of provisions not prepared or manufactured by the seller. Benjamin on Sales, Secs. 670, 671, 672, note 17, page 629, American Ed. of 1888; Schouler on Personal Property, Sec. 348; 10 Am. and Eng. Ency. of

Law, 155; Emmerton v. Mathews, 7 Exchequer, 535; Craft v. Parker, 96 Mich. 245; Buckingham v. Plymouth Water Co., 142 Penn. 221; Wright v. Hart, 18 Wend. 464; Moses v. Mead, 1 Denio 378.

The statement in Blackstone's Commentaries that in contracts for provisions, it is always implied "that they are wholesome, and that if they be not, the same remedy may be had," *i. e.*, an action on the case for deceit, is not borne out by the authorities, and is unsound unless by the statement of the remedy there is meant to be implied that knowledge by the vendor of the defect, *viz.*, a *scienter*, must be alleged and proven.

In the present case it appears that the vendee selected the pork from a larger piece, off which, by her dictation, what she purchased was cut.

It further appeared that if meat affected with trichina is thoroughly cooked, that is, heated to the temperature of about that of boiling water, the trichina will be killed and all injurious effects from their presence will be overcome.

Also, that the plaintiff cooked a part of the meat so that it was "well done," and a part was left "rare," that is, not so thoroughly cooked, but that the same had a red, bloody appearance on the inside. The statute of this State does not, in our judgment, add to the civil liability of a vendor of provisions for immediate consumption.

We do not think that the plaintiff made out a case entitling her to recover. The judgment of the Circuit Court is therefore affirmed.

Michael C. McDonald v. Fairbanks, Morse & Company.

1. PARTNERS—*Liability of the Firm.*—When parties hold themselves out as partners in any particular kind of business, and knowing in fact, or chargeable with knowledge of the character of the business transacted by one or more of them, they will not be relieved from the unauthorized acts of any member of the firm, done, apparently, within the scope of the business, as against persons dealing in good faith with the firm, without any notice that the act of the partner is not within the scope of his authority.

McDonald v. Fairbanks, Morse & Co.

Assumpsit, for goods sold. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding; submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

MAHER & GILBERT, attorneys for appellant.

ASHCRAFT, GORDON & COX, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Although there is here a record of more than three hundred pages, upon which the industry of counsel has assigned twenty-nine errors, we shall only consider the intrinsic merits of the controversy between the parties.

The appellant entered into partnership with Michael J. Tierney in the business of "manufacturing, buying and selling of all goods relating to machinists' supplies, and everything to said business belonging." He constituted Edward S. McDonald his representative and agent in the management of the business. There was no controversy as to the amount of goods sold by the appellees to the firm of M. J. Tierney & Co., but the defense is that the goods were bought without the knowledge of the appellant, and were not machinists' but steam-fitters' supplies.

They were ordered by M. J. Tierney & Co., mostly credited to the appellees on the books of M. J. Tierney & Co., and were of a character that even a court—which "will not pretend to be more ignorant than the rest of mankind" (quoted in *Fisher v. Jansen*, 30 Ill. App. 91, from 25 Ill.)—can see are used in putting into operation any machinery of which the motive power is steam. It is not claimed by the appellant that the appellees had any notice that the goods were not for a legitimate use in the business of M. J. Tierney & Co.

Under such circumstances we shall not, with the press of business upon us, undertake a review of the fifty-odd pages of brief by the counsel of appellant, but affirm the judgment.

James R. Lane v. L. C. Crossman et al.

1. **APPEALS**—*Lie from Final Orders, etc.*—As a general rule, an appeal will not lie until there is a final disposition of the whole case.

2. **SPECIFIC PERFORMANCE**—*Defendant's Inability to Perform.*—A court of chancery can not decree specific performance of an agreement to convey property, which the defendant could not, when he made the contract, perform, and which he has not since acquired the ability to perform. In such a case the remedy is at law.

3. **CHANCERY PRACTICE**—*Verification of Amendments to the Bill.*—Where an amendment to a verified bill contains matters peculiarly within the knowledge of the complainant, a verification by the solicitor is insufficient.

Bill for Specific Performance.—Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

ARND, EVANS & ARND, attorneys for appellant.

WEIGLEY, BULKLEY, GRAY & EASTMAN, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The bill filed by the appellant alleges that May 11, 1894, he and the appellee made a contract—left in escrow with the Northern Trust Company—by which appellee agreed to pay appellant \$74,800, and convey to him 140,000 acres of land in Utah and Idaho, subject to an incumbrance of \$80,000, and appellant agreed to convey to appellee some Cook county land, subject to an incumbrance of \$66,000. Then the bill alleges that when the contract was made the appellee did not own the 140,000 acres, and was not able to convey them to the appellant, and in the original bill it is further alleged that since the contract was made the appellee conveyed, fraudulently, all his property to Edwin O. Lanphere, but by an amendment it is alleged that the appellee conveyed to him, "property in the supposed consid-

eration of " \$347,200, and that appellee has not used any of that consideration in the performance of his contract with the appellant.

The bill is for specific performance, making the trust company and Lanphere parties defendant. On demurrer by the appellee the bill was dismissed as to the appellee only, and, so far as this record shows, remains pending as to the trust company, which says it is ready to obey the court, and Lanphere, who has demurred.

If the bill is intended to attack the title of Lanphere, this court can not, on this appeal, make an adjudication binding him. If it is not intended to attack his title, he has no business in the suit.

In this ambiguous phase of the case we must regard him as a party against whom the appellant claims relief. The appellant, without prejudice to any of his claims, might have dismissed the trust company out of the case, and he might also induce the court to act upon the demurrer of Lanphere, which, consistently with the action of the court upon the demurrer of the appellee, would have been sustained, and thus had a complete determination of the cause before taking an appeal.

There are no such special circumstances here as induced us to depart in *Crouch v. First National Bank*, 47 Ill. App. 574, from the general rule that an appeal will not lie until there is a final disposition of the whole case. Nevertheless we are disposed to take the appellant as he comes, and affirm the decree upon the ground that the bill shows that the appellee could not, when he made the contract, perform it, and does not show that he has since acquired the ability. *Doan v. Manzey*, 33 Ill. 227.

It is difficult on this record to avoid the conclusion that the character of the title of the 140,000 acres, subject to \$80,000, is of no consequence to the appellant; what he really seeks is the \$74,800. His remedy is at law. We pay no attention to the offered amendment which the court refused to permit. The bill and original amendment were verified by the oath of the appellant. The offered amend-

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ment was verified only by the oath of his solicitor, who could not know that the appellant, at the time of filing the original bill or first amendment, was ignorant of the matters stated in the offered amendment. *Jones v. Kennicott*, 83 Ill. 484.

The decree is affirmed.

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**Chicago Title and Trust Company, Administrator of
Ignacio Panzica, v. The Chicago and Northern
Pacific Railroad Company.**

1. *COURTS—Power to Correct Misprision of the Clerk.*—A court having no memoranda to guide its action can not, after the lapse of the term, correct the misprision of its clerk.

Trespass on the Case.—Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

PEDRICK, DAWSON & SACHSE, attorneys for appellant.

J. S. NORTON and K. K. KNAPP, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is another of the cases of great injustice in cutting off the opportunity for the party to present the case relied upon, which injustice we can but be spectators of, without power to remedy it.

The record says, and we are bound by it, that on the 4th day of June, 1894, the case was called for trial and dismissed for want of prosecution. In fact, it was dismissed under a general call of the pending cases from No. 1 to No. 20,163, which the attorneys of the appellant did not find out until September, 1894, when, on the 6th day of that month, they made a motion to reinstate the case, which motion was properly denied for want of jurisdiction to grant it. The

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case in this respect is like *Angus v. Backus-Thornton Co.*, No. 5496, this term, and must share its fate.

Why may not the object of such general calls be attained by simply striking cases from the docket on such calls, instead of dismissing them, thus leaving them pending for subsequent action, and avoid such results as appear in this case and the one cited? *Welch v. Louis*, 31 Ill. 446. The judgment is affirmed.

MR. PRESIDING JUSTICE WATERMAN.

We can not, upon this appeal, regard the affidavits filed in the court below. From them, it would seem that the clerk of the Circuit Court, by mistake, entered an order which the court did not make. Appellant doubtless had a right to believe that the cause stood for trial, and to act upon the understanding that the court had not dismissed the cause. The court having no memoranda could not, after the lapse of the time, correct the misprision of its clerk.

Whether appellant has not a remedy in equity by bill to set aside the judgment entered by mistake, is a question we are not called to express an opinion upon.

Abraham L. Griffeth v. Edith Griffeth.

1. APPELLATE COURT PRACTICE—*Records*.—The Appellate Court can not look outside of the record for anything touching the rights of the parties.

Divorce and Alimony.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

THOMAS J. HOLMES, attorney for appellant.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
Two appeals are here pending under the above title, one

from an order of October 30, 1894, for the payment of alimony, court expenses and solicitor's fees, and the other from an order of November 13, 1894, refusing to set aside the first order.

The certificate to each record is dated February 13, 1895, and states that it is a complete transcript of the record from July 30, 1894, to date, in the matter of the order appealed from. There is nothing in either record to tell us what kind of a suit was pending between the parties, though we may conjecture that they are husband and wife, and that one or the other of them filed a bill for a divorce, or that she sued for a separate maintenance.

The appeals were perfected by filing bonds November 17, 1894. January 24, 1895, a certified copy of a judgment of this court, entered December 6, 1894, reversing a decree and dismissing a bill, in a cause of the same title as these appeals, was filed in the Circuit Court. Nothing which happened after the orders appealed from were entered, can be the ground of an assignment of error here, for this court sits only to review what the court below did, not what it might do upon a ground never presented to it. Whether the judgment of this court furnishes any reason for any action by the Circuit Court, under or independent of Section 18, Chapter 40, "Divorce," is not a question for us on these records.

We can not look outside of the records before us for anything touching the rights of these parties. *Magloughlin v. Clark*, 35 Ill. App. 251; *Alling v. Wenzell*, 46 Ill. App. 562.

And on these records it does not appear that any error was committed nor any injustice done. The orders are affirmed.

**Oliver G. Dunnom, Impleaded with The M. Thomsen
Manufacturing Company v. Max Thomsen.**

1. *CHANCERY—Enforcing Abstract Rights.*—A court of chancery will not entertain a bill to enforce a mere valueless abstract right, and the court will, of its own motion, raise the point for its own protection.

Dunnom v. Thomsen.

2. *SAME—Appeals in.*—In chancery, an appeal is, in effect, a retrial of the case upon the record of the court below, with presumptions that conclusions there drawn from oral testimony are correct. All matters, whether of discretion or positive law, are subject to review.

Bill for Specific Performance.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Submitted at the March term, 1895, of this court. Reversed and remanded. Opinion filed April 22, 1895.

FLOWER, SMITH & MUSGRAVE, attorneys for appellant.

ROSENTHAL, KURZ & HIRSCHL, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
April 3, 1894, the parties above named exchanged these instruments:

“Whereas, Max Thomsen, of the city of Chicago, county of Cook and State of Illinois, has applied for letters patent for certain improvements in curling irons, etc.; that one application is No. 498,372, and there are two other applications which were applied for in the early part of March, 1894, the numbers of which are unknown to him; that for and in consideration of the sum of one dollar, the said Max Thomsen assigns, sells and sets over unto Oliver G. Dunnom, one-third of all right, title and interest which the said Max Thomsen has or may have in said invention and applications, and does further agree that immediately upon receiving said letters patent, he will assign in proper and formal manner, to the said Dunnom, one-third of all the right, title and interest in said patents, to be held and enjoyed by the said Dunnom, for himself, etc., to the full end of the term for which said letters patent are granted, the intent of this agreement being to assign, sell and set over by said Max Thomsen a one-third interest absolute in the three applications for patents on the curling irons and their improvements, as if the said patents had been granted now.

Signed, sealed, etc., the third day of April, 1894.

MAX THOMSEN. [SEAL.]

Witness: J. B. GASGOIGNE.”

"CHICAGO, April 3, 1894.

MAX THOMSEN,

DR. SIR: In consideration of your selling and assigning to me a third interest in your pat. curling irons, I agree to get up a stock company for the manufacture and sale of the said irons, and failing to do so, I will re-assign my interest as conveyed to me this date, back to you.

OLIVER G. DUNNOM."

What was to be curled the case does not show.

Then followed this correspondence:

"CHICAGO, April 4, 1894.

FRIEND DUNNOM: I have thought the matter over from all sides, and am convinced that I would not be satisfied if a company like you propose would be started. In the first place the bankers would want the control and the presidency. Second, from what I have learned since, it would be impossible for you to guarantee me my patent in case it would not turn out the way we anticipate, as it then would be the property of the company, and belong to the assets, and as I do not want to lose it, I would rather not risk it.

I am very sorry to have put you to so much trouble, but I think it is better now than later, and kindly ask you to drop the matter, as I am about to sell my store and hope to be soon in better circumstances and ready to make better propositions than I am now. Hoping you will not feel offended, I remain,

Yours,

MAX THOMSEN."

"CHICAGO, April 4, 1894.

FRIEND THOMSEN: You have no reason to back out. Why did you not think this matter over before you made your proposition? I did not ask you for any partnership, and did not know that you had any patent, but after I have made my arrangements, according to your wishes, I can see no reason why that I should be laughed at by my people, who are willing to do what you, through me, have asked them to do.

Not one promise on our side has been broken, whereas

DUNNOM v. THOMSEN.

you change your mind every day, and you have no reason to do this, for we will do whatever is honest and fair and you will get every cent due, with all benefit from a pushing business.

Yours, etc.,

O. G. DUNNOM."

April 20, 1894, the appellee executed this instrument :

"Whereas, I, Max Thomsen, of the city of Chicago, county of Cook and State of Illinois, have invented certain new and useful improvements in curling irons, and have prepared and executed proper description and specifications of the same, and have made applications for letters patent of the United States, numbers 498,372 and 504,796.

Now, this indenture, witnesseth: That for and in consideration of the sum of one dollar (\$1) and other good and valuable considerations, receipt of which is hereby acknowledged, I hereby agree to sell and transfer all of my right, title and interest which I have or may have in and to the said inventions in consequence of the grant of letters patent therefor, to a corporation, to be known when formed as The M. Thomsen Manufacturing Company, for fifteen (15) shares of the capital stock of this company named above, at the face value of one hundred dollars (\$100) per share, complete transfer to be made of all my right and title in said patents to M. Thomsen Manufacturing Company immediately after its incorporation.

In witness whereof I have hereunto affixed my hand and seal this 20th day of April, A. D. 1894.

MAX THOMSEN. [SEAL.]

Witness : R. J. FRANK."

June 11, 1894, the appellee filed this bill, afterward by amendment, making The M. Thomsen Manufacturing Company a defendant, which appeared and answered, alleging the organization of the Thomsen Company, and that in it the appellee "is holding a large interest." There is not either in pleading or in evidence any showing that either the patents or the stock of the corporation is of any value. This is fatal. A court of chancery does not concern itself

with mere disputes. *Johnson v. Steffens*, 54 Ill. App. 193. And that value is involved must appear by the record. *Watson v. Wells*, 5 Conn. 468.

The court will raise the point for its own protection against trifling; case last cited.

The decree, among other matters directing an assignment by the appellant to the Thomsen Company, is reversed and the cause remanded.

Reversed and remanded.

MR. JUSTICE GARY, ON REHEARING.

It is urged that the parties have treated the patents as of value by business arrangements, but it does not appear that in fact any business has ever been entered upon. Also that the commissioner of patents adjudged the invention to be new and useful, but if we are to regard that adjudication as a ground of presumption, it is only as a presumption of fact, and observation teaches that probably not one patent in a hundred has ever repaid the expenses of suing it out. If we are to presume anything upon the subject of value from the issue of patents, and organization of a corporation, and be guided by experience, we must presume that any money invested will be lost, and that all at stake will not prove as valuable as the ice, which in *Cummings v. Barrett*, 10 Cushing, 185, approved in *Smith v. Williams*, 116 Mass. 510, was held to be a subject-matter too trifling in value for the court to entertain.

The bill avers "that the manufacture of the article under said patent would be greatly delayed and impaired by" litigation, which can hardly be true, as the owner of part of a patent may act and license others to act under it. *Curtis, Pat.*, Sec. 190, *et seq.*; *Bump*, page 193, *et seq.*

There is nothing in the case to indicate that the appellant or appellee are likely ever to make any curling irons, nor what they would be good for if made; so that for aught that appears, the bill is to enforce, at most, a mere valueless abstract right.

Citing in the original opinion 5 Conn. was a blunder, induced by *Dan. Chy.*, 329, note 3.

Barbee Wire & Iron Works v. Malinowski.

In chancery an appeal is in effect a retrial of the case upon the record of the court below, with presumptions that conclusions of fact there drawn from oral testimony are correct. "All matters, whether of discretion or positive law, are subject to review." *Moore v. Bracken*, 27 Ill. 23.

Our duty does not require us to review theories simply. There is enough of serious business to occupy our time.

Rehearing denied.

Barbee Wire and Iron Works v. John Malinowski.

1. *SUPERIOR COURT—Its Jurisdiction.*—The Superior Court of Cook County is not a court of like jurisdiction with that of a justice of the peace within the meaning of section 2 of the act of 1891 (laws 1891, 151), providing that no suit shall be brought upon a judgment of a justice of the peace in a court of like jurisdiction within the same county where such judgment was rendered until the expiration of seven years next after its rendition.

Debt, on a justice's judgment. Appeal from the Superior Court of Cook County; the Hon. HENRY W. FREEMAN, Judge, presiding. Submitted at the March term, 1895, of this court. Reversed and remanded. Opinion filed April 22, 1895.

H. C. BENNETT and W. A. PHELPS, attorneys for appellant.

O'DONNELL & COGHLAN, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action in the Superior Court upon a judgment rendered by a justice of the peace of this county in 1892. A demurrer to the declaration was sustained.

It is urged that the suit could not be maintained because of a statute enacted in 1891, the second section of which is as follows:

"A suit may be brought upon a judgment of a justice of

the peace at any time within ten years next after the rendition thereof, and not afterward."

"Provided, however, that no such suit shall be brought upon said judgment in a court of like jurisdiction within the same county where such judgment may be rendered until the expiration of seven years next after its rendition."

The Superior Court is not a court of like jurisdiction with that of a justice of the peace.

The construction contended for might deprive a judgment creditor of the only means of collecting its judgment, as by attachment at the same term with other attachments, or garnishee process where the garnishee debtor was owing more than \$200. The statute is not one to be extended by implication. The judgment of the Superior Court is reversed and the cause remanded.

Sioux Valley State Bank v. Drovers National Bank.

1. *WAIVER—Verification of a Plea.*—In a suit upon a written instrument the right to insist upon a verified plea before the signature of the maker can be denied may be waived by a stipulation between the parties as to the facts.

2. *BANKS AND BANKING—Payment of Money to the Wrong Person.*—Title to a check payable to H. Bronson, intended for Nelson Brunson, can not be obtained under indorsement by H. Brunson, made fraudulently, though the indorsee be deceived, and pay value.

Assumpsit, on cashier's check. Appeal from the Superior Court of Cook County; the Hon. GEORGE W. BLANKE, Judge, presiding. Submitted at the March term, 1895, of this court and affirmed. Opinion filed April 22, 1895.

WILLITS, CASE & ODELL, attorneys for appellant.

E. W. ADKINSON, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

All the material facts of this case necessary to the presentation of the real question are shown by a stipulation made in the Superior Court as follows:

“For the purpose of the trial of the above entitled cause it is stipulated by and between the parties thereto as follows :

On the 23d day of January, 1892, Nelson Brunson shipped from Anthon, Iowa, to Chicago, a carload of cattle to be sold on his account, which cattle were received in Chicago and were sold on or about January 25, 1892, by the commission firm of Ottman & Minter, who realized from said sale, as the net proceeds thereof, after deducting all charges and commissions, the sum of \$575.66. After the sale Messrs. Ottman & Minter made out a statement of account in the name of H. Bronson for the said carload of cattle, showing balance due \$575.66, and wrote upon it a memorandum as follows :

‘H. BRONSON, Esq.

DR. SIR:—We enclose check \$575.66 for your net proceeds as shown. Hope you will find all O. K.

Yours truly,

OTTMAN & M. C.’

Said firm also, about the same time, directed the Drovers National Bank, defendant in this suit, to make a draft or cashier’s check for said sum, payable to the order of H. Bronson, and in pursuance of such instructions said defendant executed and delivered to said Ottman & Minter a cashier’s check, signed by its president, Solva Brintnall, as shown by the original instrument, No. 55,576, offered in evidence, which check was, on the 26th day of January, 1892, inclosed by Ottman & Minter with said statement of account in an envelope and addressed as follows: ‘H. Bronson, Esq., Anthon, Iowa,’ and deposited in the post-office, and was received about the 28th day of January, 1892, by said H. Brunson (a nephew of Nelson Brunson), who lived at Anthon, Iowa, and who thereupon wrote his name, H. Brunson, upon the back of said check and presented the same so indorsed at the plaintiff’s bank for payment. Said H. Brunson was not known at the plaintiff’s bank, but the bank paid the check by reason of the statement written on the back thereof by one W. B. Persons, who was known

at the bank, and who wrote underneath H. Brunson's name the following: 'Indorsement guaranteed. W. B. Persons,' as more particularly appears from the original instrument offered in evidence, whereupon said plaintiff cashed said check and paid the proceeds thereof, \$575.66, to said H. Brunson, who thereupon absconded with the money so obtained, and was afterward arrested for obtaining and appropriating the money under the above circumstances and was convicted and sentenced to the penitentiary. After the money was obtained as aforesaid from the plaintiff's bank by said H. Brunson, but before the check was presented to the defendant by the plaintiff for payment, Ottman & Minter notified the defendant not to pay said check. Said check was afterward, on or about February 24, 1892, presented by the plaintiff to the defendant for payment, and payment thereof was duly demanded, but the defendant refused to pay the same or any part thereof, and the check was on the same day duly protested for non-payment. When the check was cashed by the plaintiff none of its officers or agents had any knowledge or actual notice, other than that afforded by the form of the instrument and the indorsements thereon, that said H. Brunson was not fully entitled to the money.

It is further stipulated that the plaintiff, Sioux Valley State Bank, is a corporation duly organized under the laws of the State of Iowa, and that either party may, upon the trial of this cause, introduce evidence not inconsistent with the foregoing stipulation."

The appellant now urges that the indorsement could not be denied on the trial, the plea not being verified under section 34 of the Practice Act; and also that the words "said H. Brunson" in the stipulation prevent the appellee from questioning the indorsement.

The word "said" as used there is mere accidental surplusage; no H. Brunson had been before mentioned, and therefore the word had no antecedent.

The point that there was no plea verified was waived by the stipulation.

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It is apparent that it was made as showing upon what the rights of the parties depend for decision; besides, the abstract shows no such point made below.

Now, this is not a question of *idem sonans*, but of identity of person.

The check was not intended for the man who indorsed it, nor was it payable to him. The difference between "Bronson" and "Brunson" was enough to put the appellant on its guard. That it was on its guard appears from the fact that it took a guaranty. H. Brunson had no right to the money, and could confer none. Had the money been sent to the appellant to deliver to H. Bronson, a delivery to H. Brunson, for whom the money was not intended, would have been no discharge of its liability to the sender.

Even identity of name does not suffice to excuse dealing with the wrong person. *People v. Smith*, 43 Ill. 219.

The judgment is affirmed.

58	359
62	49
62	543

Murry Nelson v. Board of Trade et al.

1. PUBLIC WAREHOUSES—*Charges for Storage of Grain*.—Under the laws of this State the charges that may be made for the storage of grain in public warehouses are limited, but there is no law depriving warehousemen of the right to make their charges less than the maximum fixed by law.

2. BOARD OF TRADE—*Discipline of Members—Judgment Conclusive*.—Where the rules and regulations of a voluntary society provide for the disciplining of members and for a method of hearing as to and determining whether offenses have been committed, the judgment of such tribunal is final and conclusive; the rules, regulations and judgment of such society not being opposed to the law of the land nor in disregard of its charter or by-laws.

3. SAME—*Membership in, a Property Right*.—The membership in the Board of Trade is a property right.

4. SAME—*Power to Discipline Members—Proceedings Not to be Inquired into Collaterally*.—Where a person becomes a member of the Chicago Board of Trade and agrees to be bound by its rules and regulations, among which are by-laws for the disciplining of members and providing for a tribunal before which they may be tried, and where

such tribunal proceeds regularly in accordance with its own rules, they being not contrary to public policy or to the law of the land, and the procedure not being *mala fides* or repugnant to natural justice, the merits of a judgment thus rendered will not be inquired into collaterally.

5. CORPORATIONS—*Courts of Law Control the Power of Amotion.*—Courts of law, acting by the writ of mandamus directly upon corporations, exercise a control over the power of amotion and may and do investigate proceedings for the amotion of corporate members.

6. SAME—*When Courts of Law will Interfere with the Corporate Tribunal for the Discipline of Members.*—Where the action of a tribunal created by the by-laws of a corporation for the discipline of members is violative of the rules of the corporation, in disregard of the rights of members thereunder or of the law of the land, courts will interfere to compel the restoration of the corporate franchise of which a member has been improperly deprived.

7. SAME—*Tribunal for the Discipline of Members a Quasi-judicial Body.*—The tribunal of a private corporation created by the agreement of its members is a quasi-judicial body; but it is not, even in respect to the matters by consent committed to its charge, a court of superior jurisdiction. It acts judicially, but with a limited and inferior jurisdiction, and is bound to proceed in conformity with the rules under which it exists and acts.

8. SAME—*Agreement to be Bound by By-laws.*—A person in becoming a member of a corporation and agreeing to be bound by its laws, does not agree to submit to acts violative of the rules by which he and all other corporators are bound.

9. SAME—*Rules for Construing Statutes—Applicable to By-laws.*—The rule that the words of a statute are to be interpreted in their ordinary and popular sense, *uti loquitur vulgus*, is applicable to the by-laws of private corporations.

10. SAME—*Construction of By-laws—Bad Faith.*—The words "bad faith" imply a breach of faith—a willful failure to respond to a plain and well understood obligation. They mean not only the existence of an honorable obligation, but a dishonorable refusal or neglect to comply with the same; they imply much more than mere inability to respond.

11. SAME—*Construction of By-law Permitting Expulsion of Members for Acts of Bad Faith.*—The directors of the Chicago Board of Trade have not the power to declare that "bad faith and dishonorable conduct" which is nothing of the kind; the rule permitting expulsion for acts of bad faith is not one by which members may be expelled at the pleasure of the board, without reference to the character of the deeds it may see fit to designate as bad faith and dishonorable conduct.

12. COURTS OF LAW—*Power to Examine Proceedings of Corporations.*—Where property rights are involved, courts have the power to examine the proceedings of the quasi-judicial tribunals of corporations such as this, for the purpose of seeing if the action of such body has been in substantial accordance with the law and rules provided for its government.

Nelson v. Board of Trade.

Mandamus, to compel the restoration of a suspended member of the Board of Trade, etc. Appeal from the Superior Court of Cook County; the Hon. HENRY W. FREEMAN, Judge, presiding. Submitted at the March term, 1895, of this court. Reversed and remanded. Opinion filed April 22, 1895.

STATEMENT OF THE CASE.

This was a proceeding to compel, by writ of mandamus, the restoration of the petitioner to the privileges of a member of the Board of Trade; he having been by order of its directors suspended, indefinitely.

The petitioner alleges the ownership by the Board of Trade of real property in the city of Chicago of the value of about \$3,000,000, and the receipt therefrom of an annual net income in the way of rents of over \$54,000; that the value of a membership in said board is \$800; that trading in cereals and other products is carried on upon its floor and under its superintendence, the aggregate amount of such trading being annually very large. That the value to the petitioner of his membership is very greatly impaired in consequence of the denial to him of the privileges of membership, one of which is the right and opportunity to go upon its floor and there carry on commercial transactions with its members; that petitioner is the manager of and a large stockholder in a corporation known as the National Elevator Company, engaged in the storage and warehousing of grain. That petitioner does not, nor does he in conjunction with one Wayman, own or control a majority of the stock of said company.

It appears from the petition that it is extremely desirable for grain elevators in the city of Chicago to have the receipts they issue for grain by them held in store, regular upon the Board of Trade; that is, that upon such board the delivery of such receipts shall be by the members thereof accepted as a delivery of the grain represented thereby. The petition further sets forth—

That for many years, the said The Board of Trade of the City of Chicago adopted rules from time to time intended to make safe purchasers or holders of warehouse receipts

issued by warehousemen at Chicago, and in or about the year 1882 a rule was in force or then formulated which provided that all deliveries upon grain contracts should be made by tender of regular warehouse receipts; that by the term "regular" it was intended to define receipts issued by houses in good credit, and in other respects conforming to such regulations as should be prescribed by its board of directors; that the practice had thus grown up, or was thereafter initiated and continued until the month of August of the present year, of requiring from warehousemen in the city of Chicago a bond, with such penalty as should seem proper, and conditioned to protect the holders of receipts issued by such warehousemen, and warehousemen having given such bond were entitled to have their warehouses called regular, and their receipts were recognized by said Board of Trade and generally as representing safe and responsible warehousemen.

That after said corporation known as the Elevator Company was organized, and since its organization, it has maintained and operated a public warehouse of class A; that on or about the 25th day of January, 1890, a license to the same was issued by the Circuit Court of Cook County in accordance with law, in the name of Murry Nelson as manager, and such license has since been and is now in force; that the capacity of said elevator is 1,000,000 bushels, and it now has in store about 738,000 bushels, of which 149,000, of various grades, are owned by it.

That prior to the first day of July, 1893, a bond, with surety, was given by it to the Board of Trade in the penalty of \$500,000, conditioned to protect the receipts of said warehouse in the manner hereinbefore stated, which said bond was accepted by said defendant, and has not since been canceled or withdrawn, and a large share of the grain in said warehouse was received after the execution and delivery of said bond.

That on the 13th day of August, 1894, the said board of trade amended a certain one of its rules, known as rule 21, providing the terms and conditions under which the receipts

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of grain elevators should be deemed regular on said Board of Trade, among which amendments was a provision that the warehouses, whose receipts should be deemed regular, should charge for the storage of grain not in excess of three-quarters of one cent per bushel for the first ten days or part thereof, and one-quarter of one cent per bushel for each additional ten days or part thereof. And, furthermore, that the proprietors or managers of such warehouses should be required to sell their regular contract grades of grain or flaxseed in the Chicago market only, and shall not ship any grain from any regular warehouse, of which they are proprietors or managers, except those grades which are denominated and understood to be "off grade."

The petitioner further sets forth that the following paper was presented to the owners and managers of elevators for their signatures:

"We, the undersigned, elevator proprietors and managers, agree to apply to have our elevators made regular if the above section of rule 21 as presented to us is adopted by the Board of Trade."

That in the absence from the city of Chicago of your petitioner, and without authority from the directors of said elevator company as individuals, and without a meeting having been held or a vote taken on that subject, said writing was at such request signed on behalf of said elevator company by said Wayman as secretary or treasurer; that the corporate seal of said elevator company was not thereto attached, and your petitioner avers that in signing the same said Wayman departed, although not intentionally, from the suggestions theretofore made to him by your petitioner; that your petitioner did not know of the fact of such signature until after his return to Chicago, which was on or about the 1st day of August, 1894; that he had been unwell for a considerable time prior to his return, and after his return was, for two weeks or more, practically confined to his house and unable to transact business; that it did not occur to him to disown the signature of said Wayman, and, in fact, he was not authorized to

assume so to do on the part of the elevator company; that petitioner is advised and believes that by no shadow of moral obligation or commercial honor was he called upon to disown such act or carry, if he could have done so, the same into effect.

That your petitioner not having had an opportunity to consult with his associate directors, charges were, on or about the 31st of August, 1894, preferred to the board of directors of said Board of Trade against your petitioner, in form as follows:

“CHICAGO, Aug. 31, 1894.

To the Board of Directors of the Board of Trade of the City of Chicago:

GENTLEMEN: The undersigned, chairman of a committee of the association, hereby charges Murry Nelson with an act of bad faith and dishonorable conduct, in not carrying out the terms of an agreement signed by J. B. Wayman, secretary and treasurer of the National Elevator & Dock Co., a copy of which agreement is hereto attached.

Respectfully,

GEORGE R. NICHOLS,

Chairman.”

That on the 18th day of September, 1894, your petitioner attended a meeting of the board of directors of said Board of Trade, at which, as your petitioner believes, more than twelve were present; that your petitioner then verbally protested against the taking of any action by said board of directors upon the so-called charge which had been preferred against him, and denied the right of said Board of Trade to cite him to answer.

That after considerable conversation, questioning and answering between your petitioner and the members then present of said board of directors, your petitioner having asked and been denied the privilege of counsel, your petitioner was requested to retire, and on the morning of the following day received by mail a communication from the secretary of said Board of Trade as follows:

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“September 19, 1894.

Mr. Murry Nelson :

DEAR SIR : You are hereby notified that at a meeting of the board of directors of the Board of Trade of the city of Chicago, held on the 18th inst., upon the hearing of the complaint made against you by George R. Nichols, chairman, you were found guilty and suspended from the privileges of the Board of Trade of the City of Chicago indefinitely.

Very respectfully,
GEORGE F. STINE, Secretary.”

The petition also sets forth the following letter addressed by the petitioner to the Board of Trade while the charges were under consideration :

EXHIBIT C.

CHICAGO, September 3, 1894.

To the President and Directors of the Board of Trade.

GENTLEMEN :—The alleged agreement referred to in the charges against Mr. Wayman and me was signed by James B. Wayman, secretary of the National Elevator and Dock Company.

It was signed by him in perfectly good faith, and there is nothing to show that he, as far as he is able, is not ready and willing to carry it out.

However, through ignorance of his powers, he pretended to bind the corporation to what it could only be bound by a resolution of its board of directors. The alleged agreement is extraordinary, not in the due course of business, and could only be entered into by the corporation in a regular manner consistent with the law.

Neither Mr. Wayman, as secretary, nor I, as president, have the power under the by-laws of the corporation to make any contract unless as so directed by the board of directors.

There is no time mentioned in the alleged agreement, before which and at which the parties signing it agree to apply to be made regular. Both Mr. Wayman and I have stated officially to the committee of the Board of Trade that the National Elevator and Dock Company would prob-

ably apply to be made regular as soon as its directors could be convened and make the resolution necessary for such application.

Neither Mr. Wayman nor I own or control, either singly or together, the majority of the stock, or the votes of the directors of the corporation, and except by counsel and advice we exercise no influence beyond our voting power as directors in the corporation. However strongly we may counsel, singly or together, that the elevator company apply to be made regular under the rules of the Board of Trade, we have no power whatever to compel it.

The alleged agreement by no interpretation can be considered a contract. The Board of Trade is not a party to it; it neither signs it nor by implication agrees to do anything under it. There is no obligation upon the part of the Board of Trade to make regular any of the elevators who do apply. The Board of Trade does not agree to pass the rule, nor any other rule, nor to abide by the rule as passed for any time whatever. To-morrow the Board of Trade may pass a wholly different rule and leave the elevators no remedy. The agreement is not mutual, and there is in it no consideration whatever for the only parties who sign it. Two are the least number who can agree, and here we have only the elevators signing as one party.

No one can complain of failure to perform an agreement unless he is a party to it, and if it were admitted that there was an agreement it nevertheless is true that the Board of Trade is not a party to it.

The only thing it can be claimed is agreed to by the managers of the elevators in the alleged agreement, is that "if the above mentioned section of rule 21, as presented to (them) is adopted by the Board of Trade, that they will apply to be made regular." Nothing is said as to their application being under that rule. They do not agree not to try to obtain the passage of some other rule, and they do not agree, nor is it implied, that they will apply to be made regular at once.

By the widest stretch of imagination the mistake Mr.

Wayman made in exceeding his authority can not be considered to carry with it any implication of "bad faith" or "dishonorable conduct."

Even had he signed a contract he might not be able to carry it out, and even for his failure, were he liable in damages, he could not be said to have done anything "dishonorable" or in "bad faith."

Mere failure to perform a contract can never be considered to be evidence of bad faith or dishonorable conduct. Circumstances beyond the control of a contracting party may make it impossible for him to carry his agreement into effect. Mr. Wayman may be desirous at the present moment that the National Elevator be made regular under the present rule of the Board of Trade, and still not be able to obtain the consent of the directors of that elevator. As a matter of fact, the controlling interest of the National Elevator is held in trust for wards of court in Erie county, Pennsylvania, and accordingly the agents of the elevator company can do nothing whatever not strictly in accord with the law governing trustees, and nothing out of the due and regular course of its daily business without a resolution of its board of directors.

I, as president, could do nothing more than Mr. Wayman, as secretary, in this matter to bind the company, and my sanction or adoption of the act of Mr. Wayman could be disregarded by the directors of the corporation as not binding upon it.

The by-laws of the company state specifically the duties of its officers, and Mr. Wayman's mistake in exceeding his authority is perfectly apparent to have been made in the best of faith. I shall submit to you, gentlemen, directors of the Board of Trade, the by-law under which Mr. Wayman derives his powers, and ask you to consider if he could, under it, make a contract which would lawfully bind the corporation. It is difficult for me to believe that I, a member of the Board of Trade of Chicago almost from its beginning, should be called upon to answer a charge so trivial, groundless and unreasonable as this. I have tried to the best of my

ability, to convey to the minds of the committee before which I appeared, and now to you, gentlemen, the directors, how impossible it is for Mr. Wayman or me to bind the elevator company in this matter. It can not be possible that you, gentlemen, men of business training and wide experience in commercial affairs, should be unfamiliar with the management of corporations to such an extent that you can not appreciate the limitations under which its agents act. It can not be possible that, knowing, as you do, the present impossibility of convening the directors of the National Elevator and Dock Company, who alone can act upon the question of the adoption of the proposition of the Board of Trade, you can arbitrarily and lawlessly take advantage of its agents, Mr. Wayman and myself, whom it is claimed, one by act, and the other by adoption, have bound the company to an agreement which it has failed to perform. To be sure, there is nothing yet to show that any agreement has been made or broken, but such is the charge.

It can not be possible, when due consideration is had of the facts, that the directors will seek to censure Mr. Wayman for his inability to do what it is claimed he agreed to do, when circumstances entirely beyond his control prevent him, either from carrying into effect the supposed agreement, or from disowning and renouncing it. The most that can be said in his disfavor is that he mistook his legal powers, and that, in the strictest system of ethics, has never been accounted a wrong. "Bad faith" and "dishonorable conduct" grow only out of a conscious act of wrongdoing, and it is perfectly evident that Mr. Wayman was entirely unconscious of any intention to act except in the best faith and most honorable manner.

As I have repeatedly stated, officially, to the gentleman who charges me with bad faith and dishonorable conduct, and unofficially to other gentlemen of the board, so that it is a matter of common knowledge, I did not know that Mr. Wayman had signed anything until some time after he had done so, as I was out of the city and out of communication with him. I did not know, and I do not now think, that

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what he did sign was an agreement, and accordingly took no steps to disaffirm it. I did not know that what he did sign could be considered an agreement by any one until I was informed by this charge that it was so considered by one person at least. I am not able, if my life depended upon it, to affirm the alleged agreement, and were I to attempt to do so, in order to please any one, the National Elevator and Dock Company would still have the right to disaffirm it.

I am too old a man and have been too long a member of this Board of Trade, in good standing, not to expect from its board of directors at least ordinary courtesy, and treatment consistent with the simple principles of justice. I have been called upon to answer to a charge which would be considered in no court of the land, for a moment, nor by any committee of a club, nor trustees of any church, to require an answer or defense.

As the charge on its face is seen to be baseless and trivial, I esteem it a most grievous wrong to be compelled to make answer to it. The "bad faith" and "dishonorable conduct" lies in compelling gentlemen to answer to a malicious and libelous accusation.

Yours truly,

MURRY NELSON.

The petitioner also sets forth the following by-laws of the Board of Trade existing at the time of the preferring of the charges against him :

"When any member of the association shall be guilty of improper conduct of a personal character in any of the rooms of the association, or when any member shall be guilty of a willful violation of any business contract or obligation, and shall neglect or refuse to equitably and satisfactorily adjust and settle the same, or when any member shall willfully neglect or refuse to comply promptly with the award of any committee of arbitration, or committee of appeals rendered in conformity with the rules, regulations and by-laws of the association, or when any member shall violate any of the rules, regulations or by-laws of the association, or when any member shall be guilty of making or

reporting any false or fictitious purchases or sales, or when any member shall be guilty of any act of bad faith or any attempt at extortion, or of any other dishonorable or dishonest conduct * * * he shall be censured, suspended or expelled by the board of directors, as they may determine from the nature and gravity of the offense committed."

"All charges made to the board of directors against any member of the association for any default, misconduct or offense, shall be in writing and in duplicate, and shall state the default, misconduct or offense charged; and the same shall be signed by one or more members of the association, by a business firm, one or more of whose members shall be a member of the association, or by the chairman of a committee of the association."

APPELLANT'S BRIEF, GEO. W. SMITH AND MURRY NELSON, JR.,
ATTORNEYS.

The court is to say whether or not a by-law is reasonable or within the power of the board to enact. *State v. Overton*, 24 N. J. L. 440; *Hib. Eng. Co. v. Harrison*, 93 Penn. St. 264; *People v. Wheaton College*, 40 Ill. 186; *C. P. & P. Co. v. Tilton*, 87 Ill. 547.

A member of a corporation can not be deprived of a right or privilege by the enactment of a by-law which conflicts with the laws of the State and is not germane to the purposes of the charter. *People v. Mech. Aid. Soc.*, 22 Mich. 86; *State v. Carteret Club*, 40 N. J. L. 295; *State v. Georgia Med. Soc.*, 38 Ga. 608; *People v. Board of Trade*, 45 Ill. 412.

The Board of Trade is an incorporated association of which petitioner was a charter member.

His rights flow from the charter. *Pitcher v. Board of Trade*, 20 Ill. App. 319.

Its powers are defined by its charter. It may buy, sell and lease lands. It has become an institution for gain. *People v. Nelson*, 46 N. Y. 477; *State v. Benev. Soc.*, 72 Mo. 146; *Board of Trade v. People*, 91 Ill. 80; *Golden Rule v. People*, 118 Ill. 492; *Bd. of Trade v. N. Y. & C. Stock Exch.*, 127 Ill. 153.

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Membership is property. *Weaver v. Fisher*, 110 Ill. 146; *Jones v. Fisher*, 116 Ill. 68.

The board is given power by its charter :

1. To admit and expel.
2. To fine.
3. To enact by-laws not contrary to the laws of the land.

If it has an inherent power of expulsion, it is only for offenses of an infamous character or subversive of the purposes of the corporation, that is, working to its destruction as a body corporate.

The power to expel does not include the power to suspend. *Schassberger v. Staendel*, C. P. No. 2, Dec. 13, 1880; 9 W. N. of C. 379.

The mandamus act has been in force since July 1, 1874, and an action for mandamus is now a civil suit governed by rules applicable to "other cases at law" (Sec. 4); not to be dismissed because petitioner may have "another specific legal remedy" (Sec. 9); and is to be instituted by petitioner, not the people (Secs. 1, 4, *et seq.*). *R. S.*, Ch. 87; *People v. Webber*, 86 Ill. 283; *City v. Sansum*, 87 Ill. 182; *Dement v. Rokker*, 126 Ill. 174; *Brokaw v. Comrs.*, 130 Ill. 482; *People v. Town Mt. Morris*, 145 Ill. 427.

Mandamus is the proper remedy to restore one to the enjoyment of the privileges of an incorporated association, of which he has been unlawfully deprived. *People v. Med. Soc.*, 32 N. Y. 187; *State v. White*, 82 Ind. 278.

GREEN, ROBBINS & HONORE, attorneys for appellee; A. W. GREEN, counsel.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

We can not regard the attempt of the Board of Trade to limit the charges which warehousemen may make or the business which the managers of grain warehouses may do as an infringement of or counter to any law of this State. True it is that under the laws of this State the charges that may be made for the storage of grain in public warehouses

are limited, but there is as yet no legislation depriving warehousemen of the right to make their charges less than the maximum fixed by law. The action of the Board of Trade in this regard is merely that of declining to class the grain certificates issued by warehousemen as regular unless such warehousemen comply with certain conditions. The Board of Trade is under no legal obligation to classify warehouse certificates as regular, and the warehousemen are under no legal obligation to keep the certificates hereafter issued by them regular.

The Board of Trade and the warehousemen are each at perfect liberty to terminate all business relations.

What the effect of the rule imposing new obligations upon the warehousemen as a condition of having the certificates issued by them treated by the Board of Trade as regular, may be upon the bonds by them heretofore given to protect such certificates, is a question upon which we are not now called to express an opinion.

Whether because of the proceedings against the petitioner, as a result of which he was indefinitely suspended, the court will, by mandamus, compel his re-instatement, presents a question of more difficulty.

As a general rule it may be stated that where the rules and regulations of a voluntary society provide for the disciplining of members and for a method of hearing as to, and determining whether offenses have been committed, the judgment of such tribunal is final and conclusive, the rules, regulations and judgment of such society not being opposed to the law of the land nor in disregard of its charter or by-laws. Angell & Ames on Corporations (11th Ed.), Sec. 418; High on Ex. Legal Remedies (2d Ed.), Sec. 292; Pitcher v. Board of Trade, 121 Ill. 412.

Appellant contends that while it is true that the rules of the Board of Trade provide that a member may be suspended for "any act of bad faith," and he is charged in terms with being guilty of such an act, yet the specification in the charge, defining, as it does, what the so-called act of bad faith is, negatives upon its face the idea that such act could be bad faith upon his part.

The charge is bad faith and dishonorable conduct in not carrying out a certain agreement. This agreement it is not charged was made or signed by the petitioner or on his behalf or by his procurement; neither is it alleged that he was or is in any way a party thereto, or bound honorably or otherwise to carry the same out, or that he is able to do so.

The petitioner does appear to be the manager of the National Elevator and Dock Company, but it nowhere appears that either as such manager or personally he was a party to such agreement or is able or bound to carry the same out.

On the contrary it fairly appears that he is not able to carry out such agreement.

By the pleadings it is admitted that appellant's membership has a value of \$800. This is a substantial sum, one which never has been and can not be passed by under the maxim *De minimis non curat lex*. Such value for the purposes of this proceeding is as efficacious as if it were a million of dollars. It appears, also, by the petition, that appellee owns in the city of Chicago, real estate of the value of about \$3,000,000; that its aggregate income for the current year, 1893, was \$229,586.85, of which \$119,198.18 was from tenants occupying rooms in the building it has erected at a cost of \$2,500,000; that during said year it received for the rent of tables and drawers upon its floor, \$12,181.49, from assessment upon members, \$84,960, and paid for taxes on its real estate, \$27,252.19, for insurance, \$4,700.52, for expenses of its real estate department, \$62,719.05, and for janitor's services \$3.860, leaving a net profit derived from its real estate department of \$54,527.50; that it has outstanding an indebtedness of \$1,250,000 secured by mortgage upon its real estate.

Appellant, as a member, has an interest in this great property as well as in the net income of over \$50,000 per annum derived therefrom.

It is manifest that such a property must be managed with skill and integrity, else it will be lost to its owners. Ap-

pellant, by his suspension, is deprived of all voice in the control and supervision of this property and rendered powerless to prevent its waste or neglect by improvidence, or its dissipation through fraud.

The petition of appellant is manifestly concerning a property right. *Weaver v. Fisher*, 110 Ill. 146; *Jones v. Fisher*, 116 Ill. 68.

Courts of law, acting by the writ of mandamus directly upon corporations, exercise a control over the power of motion, and may, and do investigate proceedings for the motion of corporate members. High on Extraordinary Remedies, Sec. 291, 293, 294 and 295; Angell & Ames on Corporations, 10th Ed., Secs. 704 and 705; *The State ex rel. Cuppell v. Milwaukee Chamber of Commerce*, 47 Wis. 670; *The State ex rel. Graham v. The Chamber of Commerce*, 20 Wis. 63; *Green v. African Methodist Episcopal Society*, 1 Serg. & Rawle, 254; *Commonwealth ex rel. Fischer v. The German Society*, 15 Penn. St. 251; *Dos Passos on Stock Brokers and Stock Exchanges*, 37; *State ex rel. George E. Sibley v. The Board of Management of the Carteret Club of Elizabeth*, 40 N. J. L. 295.

The right to the writ of mandamus extends to one improperly suspended. *Lambert v. United Workmen*, 47 Mich. 86.

Appellant, in becoming a member of the Chicago Board of Trade, agreed to be bound by its rules and regulations. Among these are by-laws for the disciplining of members and providing for a tribunal before which they may be tried. Where such tribunal proceeds regularly, that is, in accordance with its own rules, they being not contrary to public policy or to the law of the land, and the procedure not being *mala fides* or repugnant to natural justice, the merits of a judgment thus rendered will not be inquired into collaterally. *Black & White Smiths Society v. Van Dyke*, 2 Wheaton 309; *Dawkins v. Antrobus*, L. R., 17 Ch. Div. 615; Angell & Ames on Corporations, Sec. 418; *Pitcher v. Board of Trade*, 121 Ill. 412-420.

When the action of such tribunal is violative of the rules of the corporation, in disregard of the rights of members

thereunder or of the law of the land, courts will interfere to compel the restoration of the corporate franchise of which a member has been improperly deprived.

The tribunal of a private corporation created by the agreement of its members is a quasi-judicial body; but it is not, even in respect to the matters by consent committed to its charge, a court of superior jurisdiction. It does, indeed, sit and act judicially, but with a limited and inferior jurisdiction; and is bound to proceed in conformity with the rules under which it exists and acts. *Ryan v. Cudahy*, Supreme Court of Illinois, opinion filed at the March term, 1895; *Labouchere v. Earl of Wharncliffe*, L. R., 15 Ch. Div. 346.

A person in becoming a member of a corporation and agreeing to be bound by its laws, does not agree to submit to acts violative of the rules by which he and all other corporators are bound.

The petitioner in the present case does not complain of the by-law providing for expulsion or suspension; his insistence is that in pretended following of the by-law, an act, manifestly not one of "bad faith" or dishonorable conduct, has been charged and found to be so; in other words, that the plain meaning of language has been tortured and perverted to the end that he might be suspended for no offense; that by violation of its rules and not in accordance therewith has he been suspended by the directors of the Board of Trade.

If the words of statutes are to be interpreted in their ordinary—their popular sense, *uti loquitur vulgus* (Endlich on the Construction of Statutes, Sec. 76; Potter's Dwarries on Statutes, page 307; *Maillard v. Lawrence*, 16 Howard, U. S. 251–261), how much the more should so just a rule be applicable to the by-laws of a private corporation, not only made for, but the enforcement of which is confided to men not learned in the law?

The words "bad faith" imply a breach of faith, a willful failure to respond to a plain and well understood obligation. They mean not only the existence of an honorable obligation, but a dishonorable refusal or neglect to comply with

the same; they imply much more than mere inability to respond.

The directors of the Chicago Board of Trade have not the power to declare that "bad faith and dishonorable conduct" which is nothing of the kind; the rule permitting expulsion for acts of bad faith is not one by which members may be expelled at the pleasure of the board, without reference to the character of the deeds it may see fit to designate as bad faith and dishonorable conduct.

To have charged the petitioner with bad faith and dishonorable conduct in not enforcing in Chicago the law against the opening of dramshops on Sunday, or in not procuring the restoration of the free coinage of silver, or in not carrying out the engagement of John Doe and Richard Roe to pay rent to the board, would have been characterized as absurd. So, too, is such a charge when described as consisting in a failure to carry out an agreement which the defendant is not alleged or shown to have been a party to, or bound or able to perform.

Where property rights are involved, courts have the power to examine the proceedings of the quasi-judicial tribunals of corporations such as this for the purpose of seeing if the action of such body has been in substantial accordance with the law and rules provided for its government. *Ryan v. Cudahy, supra*; *Angell on Corporations*, Sec. 311; *American and Eng. Ency. of Law*, Vol. 4, page 289; *State v. Williams*, 75 N. C. 446; *White v. Brownell*, 4 Abb. Pr. N. S. 446.

The judgment of the Superior Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

GARY, J.

I dissent upon the ground that the result arrived at is inconsistent with all former decisions of the Supreme Court upon the subject-matter of the petition, unless they are qualified by *Ryan v. Cudahy*, cited in the opinion of Judge Waterman, which the Supreme Court in that opinion say is not the case.

Frank E. Brady et al. v. The Pearson Lumber Company.

1. **MECHANICS' LIENS**—*Compliance with Section 4.*—The law of this State is settled that as against the owner of the premises, as well as all others, a compliance with section 4 of the mechanic's lien law is indispensable to the existence of the lien.

2. **DECREES**—*When the Bill Contains No Cause of Action.*—No neglect below by a party to a suit will validate a decree against him, when the complainant or petitioner shows by his own pleadings that he has no cause of action.

3. **APPELLATE COURT PRACTICE**—*Strangers to the Record.*—Under a joinder of error, or since the statute has dispensed with such joinder, upon briefs upon the merits, the court can not notice, upon the application of a stranger, a state of facts verified by affidavit which might have been the basis of pleas in bar to the writ.

Mechanics' Liens.—Error in the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1895. Reversed and remanded, with directions. Opinion filed April 23, 1895.

MORAN, KRAUS & MAYER, attorneys for plaintiffs in error.

WM. J. AMMEN, attorney for Warren Springer.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

On an application by a stranger to this record, a state of facts is verified by affidavit, which perhaps might have been the basis of pleas in bar of this writ, but which we can not notice under a joinder in error, or since the statute has dispensed with such joinder, upon briefs upon the merits.

The suit is to enforce a mechanic's lien against Brady as owner of, and, among others, the plaintiff in error L. Romeyn Giddings, as claiming an interest in, premises described. The petition shows affirmatively that no lien existed, because there had been no compliance with Sec. 4 of the Lien Act.

The statement filed was almost literally the same as was

58	417
58	624
58	417
62	154
159	378

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held, both by this court and the Supreme Court, insufficient in McDonald v. Rosengarten, 35 Ill. App. 71, 134 Ill. 126. And contrary to our opinion (see Orr v. Needham, 51 Ill. App., and case cited there) the law of this State is settled that against the owner, as well as others, a compliance with Sec. 4 is indispensable. Campbell v. Jacobson, 145 Ill. 389; McIntosh v. Schroeder, 39 N. E. Rep. 478.

No neglect below by a party to a cause will validate against him a decree when the complainant or petitioner shows, by his own pleadings, that he has no case. Eberstein v. Willets, 134 Ill. 101.

We need not notice any other point, but reverse the decree, and remand the cause with directions to the Circuit Court to dismiss the bill.

August Sendzikowski v. McCormick Harvesting Machine Company.

1. MASTER AND SERVANT—*Use of Defective Appliances.*—A servant obeying improper orders of a superior or using for a brief time defective appliances under a promise of immediate repair, and injured in consequence, is not without remedy.

Trespass on the Case.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Submitted at the March term, 1895, of this court. Reversed and remanded. Opinion filed April 22, 1895.

HURLEY & KOERNER and W. E. ODEN, attorneys for appellant.

UNDERWOOD & BUTLER, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

We think that the evidence in this case raised a question for the jury, under the principles constantly recognized, that a servant obeying improper orders of a superior or

58	418
58	610
58	418
72	405
72	410

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using for a brief time defective appliances under a promise of immediate repair, and injured in consequence, is not without remedy; and that therefore the court erred in instructing the jury to find for the appellee.

As the case is to go back we refrain from commenting upon the evidence.

The judgment is reversed and the cause remanded.

**Wabash Railroad Company and The Chicago & Western
Indiana Railroad Company v. William H. Smith,
Administrator of Claude B. King.**

1. VERDICTS—*Conclusive as to Facts.*—Where there is no error of law on the part of the court, the verdict of a jury against a railroad company for injuries sustained through running cars upon a street crossing without precaution, has rarely been disturbed.

2. ABSTRACTS—*As Against the Appellant.*—The abstract of the record must, as against the appellant, be deemed sufficiently full and accurate to present all the errors upon which he relies.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

GEO. B. BURNETT, attorney for appellants; LEE & HAY, of counsel.

DOUTHART & GARVY, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

In Wallace street, which is a north and south street, were two railway tracks. Seventieth street crosses Wallace at right angles. In the abstract the vicinage is vaguely described as a populous district. There were no gates nor any flagman at the crossing.

In the afternoon of May 14, 1891, the intestate of the appellee, Claude B. King, a boy between thirteen and four-

58	419
58	570
58	419
59	507
58	419
60	441
58	419
62	438
58	419
63	252
63	351
64	141
64	533
58	419
162	583
58	419
70	371
58	419
79	135

teen years old, approached the crossing from the west, as a train of cars was going south on the west track. He waited for it to pass and then started, probably quite hurriedly, to cross Wallace street behind that train, when another train running north on the east track struck and killed him. A city ordinance limited the speed of passenger trains to ten miles per hour. The testimony varied widely as to the speed of that train—from twelve to thirty miles per hour. It was in excess of the limit. No question is made as to the responsibility of the appellants, if wrong was done.

The burden of the argument for the appellants is that the deceased did not exercise ordinary care. In considering that point the surrounding circumstances are to be looked at. It is proved that a bell on the train was ringing; probably another was ringing on the south bound train—but if not, the rumble of the latter train would, to some extent, drown the sound of a bell on the north bound; and besides, if a bell was heard, when two locomotives were passing each other, how could a spectator who had notice of but one, know that it came from another?

Even on street railways, where the speed is comparatively low, one train going upon a crossing of a street as another is leaving it, has been regarded as a very material factor on a question of the comparative negligence of the parties. *Chicago City Ry. v. Wilcox*, 33 Ill. App. 450; same *v. Robinson*, 127 Ill. 9.

Where no error of law on the part of the court is in the case, the verdict of a jury against a railroad for injuries sustained through running cars upon a street crossing without precautions, has rarely been disturbed. *Lake Shore & M. S. Ry. v. Johnson*, 135 Ill. 647; *Chicago, Mil. & St. Paul Ry. v. Wilson*, 35 Ill. App. 346.

The cases are too numerous to cite. It was for the jury to decide whether the deceased was negligent in not expecting, and guarding himself against, such a method of operating the road. The only exception shown by the abstract to which the argument of the appellants can relate, is to the refusal of the court to instruct the jury that the evidence was insufficient to maintain the case of the appellee.

Provident Hospital v. Barbour.

We regard that exception as not well taken. We do not look through the record to see if other exceptions were taken. The "abstract must, as against the appellant, be deemed sufficiently full and accurate to present all the errors upon which it now relies." *Chi. Pac. & St. L. Ry. v. Wolf*, 137 Ill. 360.

The judgment is affirmed.

Provident Hospital and Training School v. Julia M. Barbour.

1. *INSTRUCTION—Duty of the Court—When Not Asked to Give.*—It has never been held in this State, error, not to instruct the jury when not requested.

Assumpsit.—Breach of contract. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

BARNETT & WILLIAMS, attorneys for appellant; C. S. DARROW, of counsel.

EDWARD H. MORRIS, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

A part of the complaint in the brief of the appellant is that the court did not sufficiently instruct the jury; the answer to which is that the appellant presented no proper instruction which the court refused. *Ames & Frost Co. v. Stachurski*, 46 Ill. App. 310, 145 Ill. 192.

The case cited as supporting the complaint is "that it would have been the duty of the court, had it been asked, to have instructed." *Roy v. Goings*, 112 Ill. 656.

It is true that in that case, in defending the right of the court to instruct when not asked, the court says: "It may

be added, such is its duty, when the promotion of justice demands it."

It has never, in this State, been held error not to instruct, when not asked.

This suit is by the appellee to recover damages for being wrongfully discharged from the service of the appellant. The evidence that she was engaged for a term of three years is in the following correspondence :

"PROVIDENT HOSPITAL AND TRAINING SCHOOL,
2900 Dearborn Street,

CHICAGO, May 30, 1893.

MISS J. M. BARBOUR :

It has been thought best by the management of Provident Hospital and Training School for Nurses, of this city and State, to economize somewhat by merging the positions of clerk and matron into one, and to secure a competent person to fill it. I have taken the liberty to suggest your name as such person, and Dr. D. H. Williams, founder of the institution, has requested me to write you and ascertain whether you purpose on soon attending the World's Fair, and if so, to invite you to call upon him at his office, as the house committee of Provident Hospital may be in a position to offer you something better than that of teaching school. Enclosed please find card bearing the doctor's address. Will also mail prospectus and first annual report of Provident Hospital.

Respectfully yours,

THEODORE W. JONES,
Member of House Committee."

"2307 Commercial Ave.

CAIRO, Ill., June 7, 1893.

MR. T. W. JONES, Chicago, Ill.

Dear Sir: Your letter bearing the date May 30, 1893, informing me of the probability of some changes at Provident Hospital has been received.

It has been a source of pleasure to me to note the progress of Provident Hospital and Training School. I am very glad to see the hospital ranking among older and more favored institutions.

Provident Hospital v. Barbour.

As yet I am undecided concerning my attendance at the World's Columbian Exposition.

Notwithstanding this fact, I should be pleased to consider a proposition from the house committee of Provident Hospital. I have taught in this State several years. Three consecutive years I have taught in the public schools of this city, and am re-elected to the same position for the coming term.

I mail you a catalogue of our public schools. (On page forty-six you will find engraving of my building.) The above being true, I presume recommendations as to my competency, integrity, etc., will be unnecessary.

Respectfully,
J. M. BARBOUR."

" PROVIDENT HOSPITAL AND TRAINING SCHOOL,
2900 Dearborn Street.

CHICAGO, June 10, 1893.

MISS J. M. BARBOUR:

Your letter of the 7th inst. at hand accompanied by the catalogue spoken of. In answer will say that both are satisfactory. Hence, I am instructed by Dr. D. H. Williams, chairman of the house committee, to inform you that Provident Hospital is in part a charitable institution depending largely for support upon a generous public; that having to pay rent, buy provisions, fuel, etc., and being entirely without endowments of any kind, that we can not afford to pay flattering salaries. Enclosed please find list of the clerk's duties, and for such services we have been paying \$5 per week, including board. This position we wish to merge into that of matron with additional powers and duties for which we feel able to pay but \$6 a week at present, including expenses, this means board, room and laundry.

I am further instructed by Dr. Williams, to ask if you would consider a proposition at the salary above mentioned.

Yours respectfully,
THEODORE W. JONES,
Member of House Committee."

"1819 Maple Street.

ALTON, ILL., June 12, 1893.

MR. T. W. JONES,

2221 Cottage Grove Ave., Chicago, Ill.

Dear Sir: Yours bearing date of the 10th inst. reached me here, having been forwarded from Cairo.

Its contents have been carefully noted, and in reply I would say that the salary proposed is less than I can accept, yet I am willing for the sake of a change from the care and confinement of the school room to accept the position if offered for a considerable length of time at a salary of thirty dollars per month.

I should, of course, like to know definitely about it at as early a date as possible, for I shall want, if I am to resign my present appointment, to give the Board of Education notice in due time to secure a good teacher.

Very respectfully yours,

J. M. BARBOUR."

"PROVIDENT HOSPITAL AND TRAINING SCHOOL,
2900 Dearborn Street.

CHICAGO, June 13, 1893.

MISS J. M. BARBOUR:

This will inform you of the receipt of your letter of the 12th, and also of the fact that Dr. Williams has authorized me to tender you the position of matron of Provident Hospital, Chicago, Ill., for one year at a salary of \$24 per month until September 1st, and \$30 per month thereafter, including board, room and laundry (this entitles you to have twenty-one pieces of clothing washed each week).

If this proposition is accepted, come at your earliest convenience, and Miss Mary Weaver, superintendent of Training School, will meet you at the depot. If declined, kindly notify either the doctor or myself.

Respectfully submitted,

THEODORE W. JONES,

Member of House Committee."

Provident-Hospital v. Barbour.

“1819 Maple street,
ALTON, ILL., June 15, 1893.

MR. T. W. JONES.

Dear Sir: Yours at hand; in reply will say that I do not feel quite satisfied in resigning a position which I have held for three years, and which is in a manner permanent, to accept another of less pay and for but one year.

The railroad fare to and from Chicago and the necessary expense incident to assuming the office of matron, or any new position, would greatly diminish one year's salary.

Had I some assurance that if I faithfully and honestly performed every duty that I would be retained, say for two or three years, or during uprightness and dutiful service, then I would at once accept.

Respectfully,
J. M. BARBOUR.”

“PROVIDENT HOSPITAL AND TRAINING SCHOOL,
2900 Dearborn street,
CHICAGO, June 17, 1893.

MISS J. M. BARBOUR:

Your letter of recent date at hand. In reference to the matter of your being engaged for but one year, to which you demur, Dr. Williams says that the length of time is immaterial with the committee; that what we most want is a woman of high moral character, who knows how to deal with the public, so far as she may have to do with it, in a way that will make friends for the hospital; who will treat visitors with courtesy, patients with consideration, and not engage in piques and quarrels with the nurses, and who will render honest and intelligent service. If you will do these things, Doctor Williams says, you may consider yourself employed for three years at the same salary and under the same conditions, and that we should be pleased to have you remain with us even longer.

Yours, etc.,
THEODORE W. JONES,
Member of House Committee.”

It is observable that all the letters from, are under letter heads of, the appellant, and it is not an unfair presumption that those heads are printed, that the letters were written at the hospital, and if the conduct of the business there was orderly, that letter press copies of them were taken and preserved.

There was evidence that Jones was vice-president of the hospital; that he, Dr. Williams and Dr. Wesley were the "house committee," of which Dr. Williams was chairman, and that Dr. Wesley took no part in running the hospital; that the letters of Jones were dictated by Dr. Williams; that the "house committee" "looked after the employment of employes there;" and that the letters of the appellee were "turned over to the hospital board."

That those letters, followed by the acceptance by the appellee of the position of clerk and matron in the hospital, constituted an engagement for the term of three years can not be questioned, if it be conceded that the letters of Jones were binding upon the appellant.

There is enough in the evidence to warrant the jury in finding that those letters were written under authority conferred by the appellant, implied from the mode of management of the hospital.

The appellee commenced her service June 19, 1893, and January 5, 1894, was discharged by the following letter :

"Jan. 5, 1894.

MISS BARBOUR :

In pursuance to instructions I forward the following to you :

A resolution reading as follows was adopted :

'Owing to the stringency of the times the greatest economy in the administration of the affairs of Provident Hospital is made imperative.

Therefore, be it resolved, that the office of matron be and is hereby abolished.'

I sincerely trust that this will prove satisfactory. Your time is supposed to expire this evening.

C. E. BENTLEY,
Secy. Board."

Stobba v. Fitzsimmons & Connell Co.

On the trial the appellant endeavored to prove that the appellee did not discharge the duties of her position properly, but the verdict is conclusive upon that point.

Of the instructions given there is no criticism except it is urged that it should not have been left to the jury whether she was employed for the term of three years.

It was a question of fact whether the letters of Jones were written under authority of the appellant; if the appellant wished any particular construction placed upon those letters, it should have presented an instruction upon the subject.

The appellee vainly sought employment after her discharge. The verdict was rendered November 27, 1894, for \$621, which gives her less than \$60 per month for wages, board and washing.

The appellant is presumably an eleemosynary institution, but the appellee is a woman, probably dependent upon her own labor for a livelihood.

There is no occasion for regret that the scales of justice hang evenly between them.

The judgment is affirmed.

Franz Stobba v. Fitzsimmons & Connell Company.

1. *ORDINARY CARE—Failure to Exercise.*—A failure to exercise ordinary care will prevent a recovery.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

E. P. LANGWORTHY and McCracken, Trainor & Cross, attorneys for appellant.

BALL, WOOD & OAKLEY, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action to recover for personal injuries sus-

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62	633
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94	187

tained by appellant while in the service of appellee, engaged in measuring timber being unloaded upon a dock.

Appellant had worked off and on in that yard for three years, was familiar with the business as there done and with all the appliances and apparatus for carrying it on. The lumber was lifted off the dock by a derrick and swung to the place where it was to be dropped.

The tongs by which the timber was grasped did not always maintain their hold. A number of times on the morning during which appellant was injured, the timber slipped from the grasp of the tongs and fell upon the dock.

Appellant's duty was to tally the timber as it came upon the dock, and this duty he could perform while the crane was being swung toward the boat, to there pick up timber. Appellant was standing on a plank which projected beyond the dock. A timber dropped upon this plank tipping one end of it up so that he was thrown into the air and injured.

It does not appear that it was necessary for appellant to have been upon this plank, or that this was a place where, in the exercise of ordinary care, he would have been. That, standing on one end of a plank so balanced, timber falling upon the other end was liable and likely to give appellant a dangerous throw, was apparent; that timbers were liable to fall he well knew. Appellant failed to show that he was exercising ordinary care.

It is contended that appellant was injured in consequence of the machinery used by appellee being defective. The only defects in the machinery are those of which appellant had, by testimony of his own witness, full notice. He knew that the hooks of the tongs were not such as to always maintain their clasp.

A failure to exercise ordinary care will always preclude a recovery. *Jerseyville v. Kingston*, 15 Ill. App. 163; *Abend v. Indianapolis & St. Louis Ry. Co.*, 113 Ill. 386; *C. B. & Q. Ry. Co. v. Swanson*, 103 Ill. 512, 521.

The judgment of the Superior Court is affirmed.

John W. Geist and George F. Geist v. George Pollock.

1. **WAIVER**—*Of Reasons for a New Trial*.—A cause for a new trial which is not stated among the reasons contained in the motion must be considered as waived, and can not be assigned as error.

2. **BAILMENTS**—*Special Deposits and Loans*.—In the afternoon, a person deposited money with a firm, taking a receipt for the same. The night following, thieves broke in and stole it. It was held that the jury were warranted in finding that the firm did not intend to keep the money intact, but would have put it in the bank to their own credit, if it had not been stolen. If so, the deposit was a loan, which the firm must repay, whatever became of the money.

Assumpsit.—Money loaned. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

JOHN T. RICHARDS, attorney for appellants.

APPELLEE'S BRIEF, KING & GROSS AND FREDERICK R. BABCOCK,
ATTORNEYS.

Gross negligence of a gratuitous bailee is always a question of fact; and whether or not a deposit is special or general, or gratuitous or for reward, is always a question of fact to be deduced from all the facts and circumstances in the case. *Nat'l Bank v. Graham*, 100 U. S. 699; *Preston v. Prather*, 137 U. S. 604; *Doorman v. Jenkins*, 29 Eng. Com. Law Rep. 132; *Gray v. Merriam*, 148 Ill. 179; *Griffith v. Zipperwick*, 28 Ohio St. 388; *Carrington v. Ficklins, Ex'r*, 32 Grattan's Rep. 670; *McDaniels v. Robinson*, 26 Vt. 316; *Newhall v. Paige et al.*, 10 Gray 366; *Scott v. Nat'l Bk. of Chester Valley*, 72 Pa. St. 471.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellants' counsel assign as error that the attorney of the appellee made improper statements to the jury in his closing argument, but no such reason for a new trial was assigned in the motion therefor, and if there ever was any

thing in the point, it was waived. *Hintz v. Graupner*, 138 Ill. 158.

This action is one of strict law, with little to recommend it *in foro conscientie*.

In the afternoon of July 7, 1893, the appellee deposited with the appellants \$500, and took this receipt:

“CHICAGO, July 7, 1893.

Rec. from George Pollock five hundred dollars on deposit.
\$500. GEIST BROS.”

It was put in the safe. The appellee and another man slept in the building. There was no watchman. That night the safe was broken open, this and other money taken.

The appellee testified—and in this was not contradicted—that on two former occasions he had deposited money with the appellants—for whom he worked—and it had been returned to him, not in the same money, but in other currency, and a check. And he also testified that he told Mr. John Geist at the time that he would not want the money until the first of March, 1894.

The only question in the case is whether a verdict for the appellee is justified by the evidence.

If the deposit was a special one—the same package to be returned—the appellants are not liable. But on that subject nothing was said; and considering how the former deposits were repaid, that the contract implied by the words of the receipt would be performed by the return of five hundred dollars in any kind of legal tender, and the ordinary conduct of merchants—which the appellants were—the jury were warranted in concluding that the appellants did not intend to keep the money intact, but probably would have put it in bank to their own credit the next day, if it had not been stolen. If so, the deposit was a loan which the appellants must repay, whatever has become of the money.

The judgment is affirmed, with the same disposition on our part, that Beatrice came to bid Benedict come in to dinner. Affirmed.

James M. Flower et al. v. John L. Beveridge et al.

1. **LIMITATIONS—*Money Paid by Mistake.***—When money is paid by mistake, the cause of action to recover it back accrues immediately upon its payment.

Assumpsit, for the recovery of money paid by mistake. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Declaration, special and common counts; pleas, general issue and statute of limitations; trial by the court; finding and judgment for defendant; appeal by plaintiff; submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

WILLIAM M. BOOTH and JAMES S. HARLAN, attorneys for appellants.

H. H. C. MILLER and W. S. OPPENHEIM, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This suit was commenced March 28, 1892, by the appellants, against the appellees, to recover back sums of money, in the aggregate amounting to \$2,490.33, paid by the former to the latter from June 30, 1883, to July 14, 1884. The appellees pleaded that the cause of action did not accrue within five years, on which issue was taken.

The facts, as the appellants claim them to be, are that they were the attorneys of the appellees, and as such collected from the assets of the defunct firm of Fay & Conkey the sums sued for, and paid them over to the appellees upon a judgment in favor of one Graves, and which by assignment the appellees owned, against Fay & Conkey, and which judgment entitled the appellees, as against Fay & Conkey, to the money.

June 21, 1887, in a chancery suit in the United States Circuit Court for the Northern District of Illinois, pending at the time of such payments, in which one Hancock, for whom the appellants were also attorneys, was receiver, and

to which suit the appellants were parties, it was held that Hancock, as receiver, received that money, and a decree was entered that his executrix should pay it to the clerk of that court. The appellants paid it to that clerk, June 24, 1887.

The appellees were not parties to that suit.

Without recapitulating the evidence, we may assume that the appellants did collect the money in the interest of the appellees; that the appellees at that time so understood and regarded the appellants as their attorneys and that the appellants so regarded themselves.

Now if the appellants were acting in the interest, and for the benefit, of the appellees, and with their assent, the doctrine that the principal must indemnify his agent for losses in the course of transacting the business (*First Nat. Bk. v. Tenney*, 45 Ill. App. 544), is applicable, so far, at least, as to require the appellees to return to the appellants money, which they were compelled to pay again elsewhere. And any erroneous opinion by the appellants under which they paid to the appellees would probably not bar them from a recovery. In such case the appellants' right of action would accrue when, and not before, the appellants were compelled to pay again. *Israel v. Reynolds*, 11 Ill. 218. But unfortunately for them, the appellants were not compelled to pay again.

The whole decree against the executrix was \$6,650.32. It was not against the appellants. It was made by a court not having jurisdiction. *Graves v. Corbin*, 132 U. S. 57, where there is a long history of the principal facts. From it she had the right of appeal. *Hinckley v. Gilman, etc.*, R. R., 94 U. S. 467.

The decree was entered June 21st, and the appellants paid June 24th. Their legal liability to pay was never established. On this record such liability does not appear. As attorneys they were only liable to indemnify the receiver's executrix against the consequences of their conduct, if they had acted without good faith or ordinary skill and care. *Weeks, Attorneys*, 373.

They do not argue that of themselves. In fact they wrote to the appellees the day after they paid that "the

Medinah Temple Co. v. Currey.

court charged the receiver, very unjustly as we think," and that "these moneys were so collected and paid by us without the authority or knowledge of the receiver, and as between us and him, or his estate, we have felt ourselves equitably bound to protect his estate, and pay the money into court."

If there was such notice to the appellees of the pendency of that suit as to affect them by its result, yet they were given no opportunity to do anything to set that result aside. The appellants, without notice to the appellees, paid in three days after the decree. That the appellants felt themselves "equitably bound to protect" the estate of the receiver does not touch the appellees.

The appellants occupied positions which turned out to be inconsistent. They were attorneys for parties with conflicting claims, the appellees and the receiver, behind whom were the creditors in the chancery suit. The appellants decided which they would pay. There was no other mistake of fact than not foreseeing what the United States court would do. Besides, if the action were to recover money paid by mistake only, the cause of action accrued immediately on payment, and this action is barred. *Leather M'f'rs Bk. v. Merchants Bk.*, 128 U. S. 26.

The case seems a hard one, but our judgment is that the law affords them no redress and the judgment is affirmed.

MR. JUSTICE SHEPARD.

I dissent from the conclusion and process of recovery.

58 433,
182s 411

Medinah Temple Company v. Arthur L. Currey, Assignee of the Charles F. Halbe Baking Company, Insolvent.

1. *LEASE—Covenant Not to Assign—Breaches.*—An assignment by mere operation of law, as a sale upon execution, is not a breach of a covenant in a lease not to assign.

2. *VOLUNTARY ASSIGNMENTS—Not a Breach of a Covenant Not to*

Assign, etc.—A voluntary assignment, under the statute, for the benefit of creditors, by a lessee, is not a breach of a covenant in his lease not to assign the same.

3. COVENANTS—*To be Strictly Construed.*—A covenant in a lease not to assign the same, is to be strictly construed.

Voluntary Assignment.—Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Submitted at the March term, 1895, of this court. Affirmed. Opinion filed April 22, 1895.

M. B. & F. S. LOOMIS, attorneys for appellant.

ELA, GROVER & GRAVES, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The principal question presented in the record of this case is whether, under the statute of this State concerning assignments for the benefit of creditors, the making by a debtor of a voluntary assignment for the benefit of creditors is a violation of any of the covenants of a lease wherein the lessor agreed "not to assign such lease, let or sublet the premises described therein, or any part thereof, without the written consent of the lessor."

It is well settled that an assignment by mere operation of law, as a sale upon execution, is not a breach of such covenant. A distinction has sometimes been drawn between assignments by operation of law, which are involuntary, *in invitum*, and those which it is said are voluntary, as between the assignments under voluntary and involuntary bankruptcies.

The distinction is more apparent than real.

If, as a result of business complications, one is unable to longer meet his obligations, and is in the situation that he must either voluntarily surrender his property to a trustee for the benefit of his creditors, or suffer them to force such surrender, the assignment is as truly compulsory in one case as in the other.

The volunteering on the part of the debtor is merely in

Medinah Temple Co. v. Currey.

taking the initial step toward a situation which is inevitable. It is the result, viz., the assignment, which forfeits the lease if it be forfeited at all; the assignment being a thing that must be, it is immaterial by whose immediate action it is brought about.

Undoubtedly, if a lessee confess judgment, or make an assignment, for the express purpose of avoiding the covenants of a lease, such action is fraudulent, and the fraud will defeat the actor. *Hutchinson v. Carter*, 8 Term Rep. 300.

While it is true that the statute of this State does not in terms provide for involuntary assignments, yet a debtor who makes an assignment, being presented with the alternative of seeing his property seized upon execution or of assigning it to an assignee for the benefit of all creditors, is in a situation in which the assignment he voluntarily makes under the statute, is really one by operation of law; that is, the lease is about to be, by force of circumstances beyond his control, transferred by operation of law; his part is merely to designate whether such transfer shall be, under the statute, for the benefit of all creditors, or through judgment and execution for the benefit of one. *Barth v. Backus*, 140 N. Y. 230; *Upton v. Hubbard*, 28 Conn. 274.

If the assignment to the husband by operation of law, of leases owned by the maid before marriage, is an assignment by operation of law, marriage being a contract voluntarily entered into, how much more is an assignment to which one is by the law driven. *Woodfall's Landlord and Tenant*, 66; *Anon. Moore*, 21.

The decision of the question here presented, depends upon whether the covenant in the lease against assigning, is to be strictly or liberally construed as respects the landlord.

It is well settled that such a covenant is to be strictly construed. *Taylor's Landlord and Tenant*, Secs. 403 and 408; *Wood on Landlord and Tenant*, Sec. 324; *Woodfall on Landlord and Tenant*, page 661; *Boyd v. Fraternity Ass'n*, 16 Ill. App. 574.

The judgment of the County Court denying the petition of appellant, is affirmed.

58 436
163s 42

Conrad E. Schrorer v. William H. Pettibone et al.

1. **COURTS—*Jurisdiction in Attachment.***—It is indispensable, to give the court jurisdiction in attachment proceedings where there is no personal service, that the writ be levied upon property or served upon garnishees having effects, choses in action or credits in their possession or power, belonging to the defendant.

Creditor's Bill.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Submitted at the March term, 1895. Affirmed. Opinion filed April 22, 1895.

STIRLEN & KING, attorneys for appellant.

H. F., F. A. & H. F. PENNINGTON, attorneys for appellees.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The original bill herein was a bill in the nature of a creditor's bill in aid of a special execution issued upon a judgment in an assumpsit suit, with attachment in aid, brought by appellant against the appellee William H. Pettibone.

It was alleged that the appellant began a suit in assumpsit against the appellee William H. Pettibone on December 7, 1892, and that on April 3, 1893, he sued out a writ of attachment in aid of said suit, and levied it upon certain real estate in Cook county, and that on June 23, 1893, he recovered a judgment *in rem* in said suit, for the amount of \$3,000, upon service by publication, and that thereafter a special execution issued against said land.

The bill then proceeds to charge that the title to said land is held in the name of the appellee Mary M. Pettibone, stating the several conveyances vesting the title in her, but that it is in fact, and in law, the land of William H. Pettibone. And the prayer was, in substance, that the land be charged with the lien of appellant's said judgment, and that it be sold to satisfy the same, etc.

Schrorer v. Pettibone.

The appellee William H. Pettibone answered the bill, and subsequently filed his cross-bill against the appellant praying that said judgment obtained by the appellant be vacated, and that he be permitted to make a defense in the said suit wherein the judgment was recovered. To the cross-bill a general demurrer was interposed by the appellant, which was overruled, and upon the appellant electing to stand by his demurrer, a decree was entered dismissing the original bill, and granting the relief prayed by the cross-bill. This appeal is from that decree.

It would unnecessarily prolong this opinion to set forth all the grounds presented by the cross-bill why the judgment in the attachment suit was fraudulent as against the appellee William H. Pettibone, for it is enough to say that the cross-bill clearly presents the question of the jurisdiction of the court to render the judgment of \$3,000 in that suit, where there was neither personal service, nor appearance, nor a levy of the attachment writ upon property of the defendant, nor service upon garnishees having money, effects, choses in action or credits in their possession or control, belonging to the defendant.

The original bill filed by appellant expressly alleges and shows that the title to the real estate attached was not in the defendant in the assumpsit suit, but was in Mary M. Pettibone, by conveyances made to her on October 9, 1891, and October 7, 1892, respectively. It is not pretended that there was ever any personal service of process had upon the defendant in said assumpsit suit, the appellee William H. Pettibone, nor that his appearance in said suit was ever entered, not that any garnishees were ever served. The sole ground for the rendering of the judgment in that suit was the levy of the attachment writ upon real estate which it is shown by the appellant's bill, and admitted by his demurrer to the cross-bill, did not belong to the defendant.

"It is indispensable, to give the court jurisdiction in attachment proceedings, where there is no personal service, it should appear the writ was either levied upon property, or served upon garnishees having effects, choses in action or

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credits in their possession or power, belonging to defendant." *Clymore v. Williams*, 77 Ill. 618; *Borders v. Murphy*, 78 Ill. 81; *Martin v. Dryden*, 6 Ill. 187.

The judgment of the Superior Court will therefore be affirmed.

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180* 401

**Chicago, St. Paul and Kansas City Railway Company v.
The Commercial Bank of Manitoba.**

1. **BILLS OF LADING**—*Delivery by a Carrier to an Acceptor of the Accompanying Bill of Exchange.*—When a bill of exchange is attached to a bill of lading and the drawee accepts the bill of exchange but does not receive the bill of lading, in the absence of any arrangement or instructions from the holder of the bill of exchange relating to the bill of lading the carrier will be justified in delivering it to the acceptor of the bill of exchange.

Trespass on the Case, for a wrongful delivery of a bill of lading. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Submitted at the March term, 1895; reversed. Opinion filed April 22, 1895.

APPELLANT'S BRIEF, GARDNER & McFADON, ATTORNEYS.

A common carrier may always excuse failure to deliver to a claimant by showing that he delivered to the true owner. *Brunswick v. Express Co.*, 46 Iowa, 677; *Porter on Bills of Lading*, Sec. 464.

The effect of the indorsement and delivery of a bill of lading is to transfer to the indorsee or holder, such right to or property in the goods thereby represented, as it was the intention of parties to pass, and that intention is to be gathered from all the circumstances attending the transaction. *Emery v. Irving Nat. Bank*, 25 Ohio St. 360; *Porter on Bills of Lading*, Sec. 508.

The property acquired in goods covered by a bill of lading, by one to whom the latter is pledged as collateral security for the discount of the draft drawn against it, is a

C., St. P. & K. C. Ry. Co. v. Commercial Bank.

special property. His title is conditional, and in case of a time draft, it is conditioned upon the consignee's acceptance, and is by such acceptance divested. Porter on Bills of Lading, Secs. 521, 523; Marine Bank of Chicago v. Wright, 48 N. Y. 3; National Bank of Commerce v. Merch. Nat. Bk., 1 Otto 92; Lanflar v. Bossom, 1 La. Ann. Rep. 148; Wis. Ins. Co. v. The Bank, 21 Up. Can. Q. B. 284; 2 Up. Can. Error & Appeal Rep. 22; Shepherd v. Harrison, L. R. 4 Q. B. 493; Coventry v. Gladstone, L. R. 4 Eq. 493; Gurly v. Behrend, 3 El. & Bl. 622; Allen v. Williams, 12 Pick. 301; Dodge v. Meyer, 61 Cal. 417; Bank of Richmond v. Jones, 4 N. Y. 497; Dowd v. Greene, 24 N. Y. 638; First Nat. Bank v. Kelley, 57 N. Y. 360.

APPELLEE'S BRIEF, PECKHAM & BROWN, ATTORNEYS.

The acceptance of a draft to which a bill of lading is attached, does not of itself pass any title to the goods, and does not justify a carrier in delivering them to the acceptor, without the production of the bill. The Thames, 14 Wall. (U. S.) 98; Natl. Bank of Commerce v. Merchants Natl. Bank, 91 U. S. 92; Gilbert v. Guignon, L. R. 8 Ch. App. 16; Seymour v. Newton, 105 Mass. 272.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

A lengthy statement of facts here would only serve to show that the case involves this question: When bills of exchange drawn on twenty days' sight are attached to bills of lading, and the drawee accepts the bills of exchange but does not receive the bills of lading, and there is no evidence of any arrangement or instructions from the holder of the bills of exchange relating to the bills of lading, is the delivery by the carrier to the acceptor a wrong delivery for which the carrier is responsible to the holder of the bills of exchange? If the acceptor was entitled to the bills of lading, it can hardly be contended that the mere fact that they were not delivered to him, there being no evidence of any design by anybody, could

make any difference in the rights or liabilities of the holder of the bills of exchange or the carrier.

We read *National Bank v. Merchants Bank*, 1 Otto, 91 U. S. 92, as decisive in favor of the carrier, and therefore reverse without remanding, that the question may at once go before the Supreme Court. **Reversed.**

Edgar W. Duncan v. Caroline Humphries.

1. **RESCISSION OF CONTRACTS—Offer to Return Consideration.**—A party can not rescind a contract and at the same time retain the consideration he has received. He must put the other party in as good a condition as he was before the contract was made by an offer to return what he has received.

2. **SAME—Conditions Precedent.**—To lay the foundation for a bill to rescind a contract, the complainant must, before the commencement of his suit, offer and be willing to perform such acts on his part, as will restore the defendant to the position which he occupied before the transaction.

Bill to Rescind a Contract.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Submitted at the March term, 1895, of this court; reversed and remanded with directions. Opinion filed April 22, 1895.

JOHN H. BRADLEY, attorney for appellant.

THOMAS H. GAULT, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

We assume on this record that the appellee and her husband, who acted with and for her in the business which is the subject of this suit, are ignorant colored persons, who lived in Atlanta, Georgia; that the North American Deposit and Investment Company, chartered in Iowa, with its principal office in Dubuque, and branch offices in Chicago and Atlanta, was a good company for such persons not to do business with; that the appellant was in such relations

Duncan v. Humphries.

with that company that he had notice of, and is affected by all equities affecting the company.

In April, 1892, she, at Atlanta, applied to the company for a loan of \$1,200 for five years, and as a result she gave to the company a note for that sum payable April 22, 1897, with seven per cent interest, payable semi-annually, with coupons for that interest; another note for \$60, payable \$6 every six months for more interest; a subscription for eighty shares of stock in the company with forty-seven coupons of \$16 each, payable monthly from April 1, 1892; and a warranty deed of a house and lot in Atlanta, valued in her application at \$2,900. The company gave to her a bond to reconvey the property on payment of the notes and coupons for the \$1,200, and two certificates, each for forty shares of \$10 each, paid up stock in the company. How much money was given to her, or for her paid out by the company, we shall not undertake to determine. There was no reference to the master to state an account, though the defendant presented an account of a dozen items which seems to have been wholly disregarded below.

The bill filed by the appellee to rescind the transaction, acknowledged the receipt of \$460, and the decree accepts that as the true sum.

Why this appellant, who lives in Salt Lake City, and was not found, and therefore not served with process, in Illinois, ever appeared in, and thereby gave jurisdiction over his person to, a court in Illinois, in a suit relating to real estate in Georgia, remains to us a mystery; and what effect is expected to follow in Georgia, from a deed made by a master in chancery of the Circuit Court of Cook County, Illinois. Black on Judgments, Sec. 872.

The decree is "that there is due to Duncan \$460, and it is ordered that upon the payment by complainant of that sum and interest at seven per cent, from April 22, 1892, to the date of this decree and six per cent thereafter until paid, within ninety days therefrom, that he convey said real estate to complainant, and surrender the note and coupons, in default of which a master in chancery execute such conveyance; that in default of payment by complainant the deed

to stand for a mortgage securing \$460, and that Duncan be permitted to foreclose it for that amount; that upon the return of the certificate representing the forty shares of stock to the company, it shall cancel and return to complainant the application for the loan, the sixty dollar note and the complainant's subscriptions for stock."

We shall not undertake to defend the conduct of this company. If we assume to be true all that the appellee in her bill alleges of deception and fraud, the fact remains that she never took a step toward rescinding the transaction. Ignorance may be an excuse for a lack of prudence and caution in the transaction itself, but to lay a foundation for a bill to rescind, the complainant must, before suit, offer and be ready and willing to perform such acts on his part, as will restore the other party to the position which he occupied before the transaction. *Rigdon v. Walcott*, 43 Ill. App. 352; 141. Ill. 649.

The jurisdiction *in personam* to compel acts affecting real estate abroad, if it could be here exercised, does not affect the rule that a bill to rescind does not lie without such previous offer, readiness and willingness.

Whether in Georgia, where, we may assume, a court can act upon real property there, by constructive service upon parties in interest, such offer, readiness and willingness might be, where the opposite party is inaccessible, by proceeding in the court itself, is not for us to consider.

The bill can not be treated as a bill to redeem from a mortgage, because by the laws of the State of Georgia, which State has the right to make the laws governing real property within its boundaries (*McCarthy v. Osborn*, 118 Ill. 403), such a transaction as this, viz., a deed and bond back for reconveyance, does not constitute a mortgage. Code of 1882, Sec. 1969. A proper construction of that statute, which we do not copy in full, would seem to be that the relation of vendor and purchaser is created by such a transaction, under which relation the party, who with us would be a mortgagor, would be a purchaser, and as such, would be entitled only to a specific performance upon the terms of the bond to reconvey.

Badger Paper Co. v. Pease.

The decree is reversed and the cause remanded, with directions to the Circuit Court to dismiss the bill without prejudice to any right or remedy of the appellee in any other proceeding, but at her costs of this suit.

Mr. Justice SHEPARD, dissenting.

It being manifest that the equities are strongly in favor of the appellees, I think instead of dismissing the bill for the want of a proper offer upon which to base a rescission, the cause should only be reversed, with directions to permit the appellees to amend their bill by offering to pay the sum found due, and that the decree should be modified so that instead of requiring the appellant to foreclose his mortgage for such amount, the appellee be required to pay such sum within a short day to be fixed, and thereupon the appellant be required to recover the Georgia premises, and if the payment be not made, that then the bill be dismissed.

Badger Paper Co. v. James Pease et al.

1. *WAIVER—Of Error in Quashing Writ of Garnishment.*—When a writ of garnishment is quashed as to a defendant and he answers interrogatories afterward filed, all errors in quashing the writ are waived.

Attachment and Garnishee Proceedings.—Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Submitted at the March, 1895, term of this court and dismissed. Opinion filed April 22, 1895.

STATEMENT OF THE CASE.

On the 19th day of January, A. D. 1895, an affidavit for attachment was filed in the Superior Court of Cook County, alleging that the defendant, Francis Wheeler, was indebted to the plaintiff, the Badger Paper Company, in the sum of \$638.83, upon a promissory note, and that the defendant,

Francis Wheeler, had within two years last past fraudulently conveyed, or assigned his effects, or a part thereof, so as to hinder and delay his creditors.

Upon filing this affidavit and bond as provided for by the statute, an attachment writ was issued, directed to the coroner of Cook county to execute. And on the same day James Pease, sheriff of Cook county, and Edgar L. Jayne, of Chicago, were served as garnishees.

On the first day of February, A. D. 1895, James Pease, one of the garnishees, entered a special appearance for the sole purpose of moving the court to quash the writ of garnishment against him.

On February 2, A. D. 1895, James Pease, said garnishee, moved the court to quash the writ of garnishment and service upon him as garnishee, and discharge him as such garnishee, and in support of said motion offered to read the following affidavit:

STATE OF ILLINOIS, }
County of Cook. } ss.

BADGER PAPER COMPANY
vs.
FRANCIS WHEELER. } Attachment.

James Pease, sheriff of Cook county et al., garnishees.

Charles W. Peters, being first duly sworn, on oath deposes and says that he is the chief deputy sheriff of Cook county, Illinois, and that on the 7th day of January, 1895, an execution was placed in the hands of said James Pease, sheriff of Cook county, for \$4,074.43 and \$10 costs, at the suit of Mary Walter v. Francis Wheeler, on a judgment entered that day in the Circuit Court of Cook County, and that on said 7th day of January, 1895, said sheriff levied on personal property of said Francis Wheeler, at No. 106-8 West Washington street, Chicago, and after duly advertising the sale, duly sold the said property at sheriff's sale according to law, and now has on hand as the proceeds of said sale a certain sum of money ready to be turned over, and to apply on said execution, but not sufficient amount to satisfy the same in full, and that said James Pease, sheriff, etc.,

Badger Paper Co. v. Pease.

received and holds the said money solely and only, by having levied upon and sold said property, and converted the same into money under said judgment and execution as the sheriff of Cook county, in his official capacity as such sheriff and not otherwise, and that he has no right, title or interest in or to said money except as sheriff, as aforesaid; and this affiant further says that on or about the 19th day of January, 1895, the coroner of Cook county, State of Illinois, served said James Pease, sheriff of Cook county, Illinois, as garnishee in said attachment suit of said Badger Paper Company against said Francis Wheeler, which said attachment writ recites that the said plaintiff is entitled to recover of said defendant, Francis Wheeler, the sum of \$688.83, and which said writ is returnable on the 4th day of February, 1895, a copy of which said writ is hereto attached and made a part hereof, and because the said sheriff has been served as garnishee, as aforesaid, he declines to pay over any portion of the money received by him and now held by him, as aforesaid, on said execution, unless the said garnishee writ and the service aforesaid on him as garnishee, as aforesaid, is quashed.

CHARLES W. PETERS.

To the reading of which the plaintiff objected. The court overruled the objection of the plaintiff and permitted the affidavit to be read, and after the reading of said affidavit, the court quashed the writ of garnishment as against James Pease and discharged him as garnishee, to which decision of the court the plaintiff excepted. The ruling of the court permitting Peters' affidavit to be read in support of the motion to quash, and the quashing of the writ of garnishment as to James Pease are the principal grounds of error complained of by the plaintiff.

WILBER, ELDRIDGE & ALDEN, attorneys for appellant.

EDGAR L. JAYNE, attorney for appellees.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Notwithstanding the order quashing the writ as to James

Pease, interrogations were afterward filed and he has answered the same. The cause seems to be now by his appearance pending against him.

The appeal is therefore dismissed.

Alexander M. Stewart v. Chicago General Street Railway Co.

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58	518
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67	138
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60	512
166a	61

1. *STREETS—Rights of Abutting Owners—Public Interests—Attorney General.*—If the abutting owner is entitled to enjoin the use of a public street, it is because of his private right; he can not assume to, because he does not represent the public. The attorney general is the only proper representative of the public, and in suitable cases, bills may be by him maintained to protect public interests.

2. *SAME—Suit of Individual Owners of Abutting Property.*—The difficulty with a proceeding at the suit of individual owners of abutting property, to either restrain or compel the use of a public street for a particular purpose, is that such suit concludes no one but the parties to it.

3. *SAME—Duty of the Attorney General.*—The attorney general is the proper party to represent the public, and a bill will not lie at the instance of an individual, to restrain the doing of that from which the complainant will suffer no damage other than that which the public sustains.

4. *SAME—Interests of Abutting Owners in the Street.*—The abutting property owners do not own the fee of the street. The street is held by the public authorities in trust for the use of the public. The abutting owner has a right of access to his property, a right to the light and air that naturally come to his premises from the public way, but the use of, or to control the use to which the street may be put, he has no more right than any of the other millions for whose convenience the highway exists. If, by reason of the taking of the street for a new public use, his property is specially damaged, he is entitled to recover such damage in an action at law.

5. *SAME—Railroad Tracks Therein—Power of Public Authorities.*—Before the public authorities can give to any one the right to lay railroad tracks in a public street, the consent of a majority of the owners of abutting property must be had, and with such consent, the right to put down such tracks can only be given for public purposes. The street is servient to the public, for its use, and neither by the authorities of the city, nor by the consent of the abutting owners, can the public be excluded therefrom.

Stewart v. Chicago General St. Ry. Co.

6. **ABUTTING PROPERTY OWNER—Does Not Represent the Public.**—While an abutting property owner can not assume to represent the public, and by his individual suit for damages, special and peculiar to himself, conclude its rights, he has, under the constitution and laws of this State, a remedy at law for special damages he may sustain.

7. **SAME—Special Damage to.**—The fact that by permission to use the street for a particular purpose, an abutting property owner will be specially damaged, affords no ground for restraining such use, so long as the property owner is able to recover and collect all the damage he suffers.

Bill for Relief.—Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Submitted at the March term, 1895. Affirmed. Opinion filed April 22, 1895.

STATEMENT OF THE CASE.

The bill in this case is stated in the abstract of the record to be as follows:

Bill of complaint by Alexander M. Stewart, filed November 26, 1894, that he is the owner of fifty feet of frontage on Lawndale avenue, Chicago; that the West and South Towns Street Railway Company is incorporated under the laws of Illinois, commonly called the act in regard to horse and dummy railways; that on February 8, 1892, the city council of Chicago, on the petition of said company and the petition of the owners of more than one-half of the frontage of so much of the street sought to be used for railway purposes, passed an ordinance granting authority to construct a railway on Lawndale avenue past the premises owned by complainant; that said railway is constructed and in operation; that the Chicago General Street Railway Company is also incorporated under said act in regard to horse and dummy railways; that said West and South Towns Railway has granted to said Chicago General Street Railway Company the right to operate an electric trolley railway over the tracks above described; that said Chicago General Street Railway Company is about to enter into the use of said street without any petition whatsoever of the owners of land representing any part of the frontage of said street, and without any ordinance or authority whatsoever of the city, its sole authority for such use of said street being the pretended lease of said West and South Towns Railway.

That any use of said street for railway purposes by said Chicago General Street Railway Company without said petition of owners and without any authority from the city council is contrary to clause 90, Sec. 62, Chap. 24, R. S., being the act relating to incorporation of cities and villages

That there is no authority under the law for said West and South Towns Railway to lease any of its privileges and no authority for said General Street Railway to take or acquire the same.

That there is no authority in the act under which said company is incorporated to operate any other motive power than horse and dummy locomotion.

Prayer for process and injunction to restrain appellant from the use of Lawndale avenue, etc.

Exhibit A, Sec. 1. Ordinance of the city of Chicago, granting West and South Towns Street Railway, its successors and assigns, authority to construct and operate a railroad on Lawndale avenue from 22d street to 35th street. Section 3 authorizes the operation of cars by animal or cable power, electric, compressed air or gas motors.

To this a special demurrer, interposed by appellee, was sustained, and the bill dismissed for want of equity.

JOHN J. COBURN, attorney for appellant.

APPELLEE'S BRIEF, C. L. BONNEY AND PECK, MILLER & STARR,
ATTORNEYS.

The abutting property owner's right to use the street is no greater than that of each and all of the public. He is but one of the millions composing the public, and unless he sustain from the use to which the street is put by the municipal authorities, a damage, special and peculiar to himself, he can not maintain a suit to compel the abandonment of such use; he can not assume to represent the public, and by his individual suit conclude its rights. *Davis v. Mayer*, 2 Duer, 663; *Winterbottom v. Lord Derby*, 2 Law R. Ex. 316; *Hartshorn v. South Reading*, 3 Allen 501; *McDon.*

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ald v. English, 85 Ill. 232; High on Injunctions, Sec. 762; Pomeroy's Eq. Juris., Sec. 1379; City of East St. Louis v. O'Flinn, 119 Ill. 200; City of Chicago v. Union Bldg. Ass'n, 102 Ill. 379; Patterson v. C. D. & V. Ry. Co., 75 Ill. 588; Vanderpoel et al. v. The West & South Towns Ry. Co., Chicago Legal News, March 24, 1894.

For damage, special and peculiar to himself, an abutting property owner has, under the constitution and laws of this State, a remedy at law. The fact that by permission to use the street for a particular purpose an abutting property owner will be specially damaged, affords no ground for restraining such use so long as the property holder is able to recover and collect all the damage he suffers. Vanderpoel v. The West & South Towns Ry. Co., *supra*; Loire v. North Chicago St. Ry. Co., 32 Fed. Rep. 270; People v. Kerr, 27 N. Y. 188; Moses v. Pittsburg R. R., 21 Ill. 516, 523; Stetson v. C. & E. I. R. R., 75 Ill. 74; Patterson v. C. D. & V. R. R., *Id.* 588; Peoria, etc., R. R. v. Schertz, 84 Ill. 135; C. & E. I. R. R. v. Loeb, 118 Ill. 203; C. & E. I. R. R. v. Ayers, 106 Ill. 511; Pittsburg & Ft. Wayne R. R. v. Reich, 101 Ill. 157, 176; C. & E. I. R. R. v. McAuley, 121 Ill. 161; Penn. M. L. I. Co. v. Heiss, 141 Ill. 35, 58, 59.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The first question for consideration upon this appeal is whether a court of equity will, in the case presented by appellant's bill, interfere at the suit of an owner of abutting property to restrain the use, for public purposes, of a street by a private corporation.

The question really is, whether an abutting owner has such a private right—vested interest—in the use to which a public street may be put, that he is entitled to have such private right and interest respected and protected by the people's writ of injunction.

It is manifest that if the abutting owner is entitled to enjoin the use of a public street, it is because of his private right; he can not assume to, because he does not represent

the public. The attorney general is the only proper representative of the public, and in suitable cases bills may be by him maintained to protect the public interests. *Kerfoot v. The People*, 51 Ill. App. 409; *Attorney General v. The Newberry Library*, 51 Ill. App. 166; same v. same, 150 Ill. 229; *Hunt v. Chicago Horse & Dummy Ry. Co.*, 121 Ill. 638.

If one abutting property owner may, for such an injury to the public, file a bill and obtain an injunction, then each of such owners may do likewise.

Mr. A, the owner of a lot, obtains upon his bill an injunction against the contemplated use. His bill is answered; testimony is taken; upon hearing, the evidence, being considered, is found not to sustain the allegations of the bill, whereupon it is dismissed. Mr. B immediately files his bill, the allegations being the same as those in that of Mr. A, with the necessary variation as to the description of the lot of which B is the owner. If the bill of A presented a case for an injunction, the bill of B does; it is no answer to say that the court has found the allegations in the bill of A to be untrue; Mr. B was not a party to that suit; he is not bound by the conclusions there reached; he is entitled to be heard upon the charge by him made; he well urges that it by no means follows that he may not establish the truth of allegations which A failed to prove; and that the rights of B can not be foreclosed by a suit brought and prosecuted by A.

The court can not be a respecter of persons, and to be consistent must give B an injunction and hear his cause. The second suit results like the first, whereupon C files his bill demanding an injunction and a hearing. How can he be denied? In brief, if one abutting owner is entitled to, by injunction, maintain the public right, why is not each, successively?

If appellant may upon his bill obtain an injunction restraining the use of the street by appellee, why may not another abutting property owner, in another and proper proceeding, obtain an order compelling appellee to comply with its contract with the public, by placing rails upon and running cars for the carriage of passengers along the streets?

The difficulty with proceedings at the suit of individual owners of abutting property, to either restrain or compel the use of a public street for a particular purpose, is that such suit concludes no one but the parties to it. The very decree and restraining order appellant seeks, he might for a selfish and personal consideration release; he can establish only his property right, and that he may barter in any lawful way.

For these and other reasons it is well established that the attorney general is the proper party to represent the public, and a bill will not lie at the instance of an individual to restrain the doing of that from which the complainant will suffer no damage other than that which the public sustain.

The abutting property owners do not, in this as in some other States, own the fee of the street. The street is held by the public authorities in trust for the use of the public. The abutting owner has therefrom a right of access to his property, a right to the light and air that naturally come to his premises from the public way, but to the use of, or to control the use to which the street may be put, he has no more right than any of the other millions for whose convenience the highway exists. If, by reason of the taking of the street for a new public use, his property is specially damaged, he is entitled to recover such damage in an action at law. To one who desires at his home quiet and peace, it may be annoying that thousands should pass his door in noisy omnibuses or crowded cars. The right, however, to say who shall ride or walk past his door does not belong to him. The street is for the use of the public, of which he is but one.

Before the public authorities can give any one the right to lay railroad tracks past his property the consent of a majority of the owners of abutting property must be had, and with such consent, the right to put down such tracks can only be given for public purposes. The street is servient to the public, for its use, and neither by the authorities of the city or by the consent of the abutting owners, can the public be excluded therefrom.

In endeavoring to restrain the running of street cars for the accommodation of the public, appellant is asserting that he has a private right in the street superior to that of the public or that he is entitled to represent the public in his suit and conclude the millions by a decree rendered in litigation to which they are not parties.

In support of the position that in such a case as this a court of equity will, at the suit of an abutting property owner, restrain the running of cars upon the street, a large number of authorities have been cited, a few of which we have examined. Taking them in the order of citation the first to which our attention is called is that of Hickey v. The Chicago and Western Indiana Railway Co., 6 Ill. App. 172.

The opinion in this case was by the late Judge McAlister, and contains among other things, upon pages 186 and 187, the following :

“The bill in this case contains some eighty-two complainants. This multiplicity of plaintiffs, while it tends to obscure the merits and embarrass the remedy, was dictated doubtless by the fear of the suit being quietly disposed of by settlement with plaintiffs, if there were but few of them. As to thirty-five of these plaintiffs, the bill shows by its statements, their ownership, respectively, of real estate which the railroad company proposes under said ordinance to take and enter upon, or which is so located as to be specially injured by the construction of the railroad within the city under said ordinance. As to these, the bill shows a clear case for the interposition of equity by injunction, on the ground that the act threatened would be in excess of the power of the corporation; the entry upon plaintiff's lands would not be a mere trespass, but a continuing permanent injury to the owners of the land to be taken, and those whose premises were so situated as that they would receive special injury from the construction of the railroad, are equally entitled to the relief sought. As to the other plaintiffs, in respect to whose property they “would be more or less injured,” we do not think the bill shows any case. There must be some special injury. *Milhan v. Sharp, supra*;

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and this must be shown by facts stated." * * * "The bill was therefore well brought as to all plaintiffs whose land was about to be taken, or suffer special injury by the construction of the said railroad within the city. As to the other plaintiffs no case is stated within the jurisdiction of the court, though they asked relief against the same injury upon the same ground."

So far, then, from this case being an authority for the position assumed by appellant, it is directly the reverse; as to all the complainants in this bill occupying the position which appellant does here, the bill was dismissed.

The next case cited is that of *Cobb v. I. & St. L. R. R. Co.*, 68 Ill. 233. The opinion begins with this statement:

"In December, 1871, plaintiff in error filed a bill in the St. Clair Circuit Court against defendant in error to restrain it from laying its railroad track over his land." To this bill defendant filed a demurrer, which the court below sustained and dismissed the bill. The opinion of the court on page 234 goes on:

"It is admitted, then, that complainant was in possession and had such title as authorized him to resort to the courts for protection of his rights; that the company, without any pretense of right, were threatening to make a forcible entry upon his land to make a permanent structure, and to remove his sand and soil for sale, and by so doing it would endanger the destruction of the property itself, by turning the current of the river over his land, and only that they may convert his soil and sand into money. As admitted, this presents a case of a wanton, willful and most oppressive character. It is in utter disregard of right and in defiance of law, and devoid of every principle of fairness. When an answer shall be interposed, it is to be hoped that it may be shown that there was not such recklessness as is charged in the bill."

It is quite manifest that the relief furnished in such case does not warrant the granting of appellant's prayer.

The next Illinois case, to which our attention is called, is that of *Snell v. Buresh*, 123 Ill. 151, in which it was held

that a court of equity would restrain the successor of a corporation, owning and operating a plank road for the use of the public, with power to erect toll gates thereon, from putting up a toll gate on such road, in such a way and at such a place as to materially interfere with the use of two public highways, the erection of such toll gate being in excess of the power of such plank road corporation; the court holding that the act sought to be restrained would be but the creation of a nuisance, and would be especially injurious to the complainant's property and materially interfere with their business.

The next Illinois case in the order of citation is that of *Field v. Barling*, 149 Ill. 556. This was a suit to restrain the construction of a bridge over an alley in the city of Chicago. It appeared that the complainant and the defendant claimed title from a common source, their grantor having made a record and subdivision, in which said alley appeared as appurtenant and servient to the respective lots of the parties to the litigation. The opinion says on page 574:

"But from an examination of all the evidence we are satisfied that the erection of the structure would result in serious damage to appellees' property, different in character from that sustained by the public."

That case is clearly not authority for what appellant asks here. The parties do not claim title from a common source, and appellant does not claim that his property will sustain damage different in character from that sustained by the public.

The next case is that of *Zearing v. Raber*, 74 Ill. 409.

The statement is that this was a bill in chancery to prevent a threatened obstruction of the use of a street or way, and that the facts appear in the opinion. The opinion sets forth the laying out by the owners of a certain lot, of a street across the same, and the preparing of a map showing such street, which map was, however, neither acknowledged nor recorded, and the conveyance by such owners of real property with reference to such street. The opinion then

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states that the question is whether a party who had conveyed premises referring to and describing such street can now be heard to deny the existence of a street, and concludes :

“The evidence shows a threatened nuisance, tending to deprive appellee and others of the full and free use of this street, as he is entitled to have it used, and this is a well recognized ground for equitable interposition.”

In the present case appellant does not claim that in any way or wise he is about to be deprived of any use of the street.

Our attention is next called to the case of the Village of Princeville v. Auten et al., 77 Ill. 325.

This was a bill filed to restrain the village trustees from moving a town hall from the site it then occupied and placing it on a public square.

The court held that the evidence clearly shows that it was the intention of the proprietors of the town in dedicating this square that it should forever remain open for the convenience and common benefit of the inhabitants of the village; that the village authorities held the same in trust, to be devoted to the uses and purposes for which it was dedicated, and that an individual might restrain the public authorities from converting the property to a use different from that for which they held it in trust.

Appellant's bill does not contain any charge that the street held in trust for the use of the public is about to be diverted to other uses.

The next case is that of the Attorney-General v. The Chicago and Evanston Railway Co., 112 Ill. 520, that being a proceeding by the attorney-general, who, as we have before stated, is the proper officer to represent the public, can not be authority for the position that a private individual may, by his private suit, determine the manner in which the public shall pass over a common highway.

The next case cited is that of the City of Jacksonville v. The Jacksonville Railway Co., 67 Ill. 540.

The court in its opinion said :

"By virtue of its charter, the railway company claim the right to construct the track of its road across a public square, operate its road there, and thus frustrate the original purpose for which the ground was dedicated, and destroy its future benefit and enjoyment as a public park.

"This bill was filed to restrain the company from such an appropriation of this public ground."

The case is merely one to restrain the diversion of trust property to uses entirely foreign to those set forth in the deed creating the trust.

The next case is that of the Village of Brooklyn v. Smith, 104 Ill. 429.

The court, in its opinion, upon page 439, said:

"The case presented seems to be that of an intruder upon the public street of a village seeking an injunction against the village authorities to prevent their interference with his operations in cutting and removing ice from the street, that is, a trespasser, asking, against the legal owner, freedom from interruption in the despoilment of the latter's property. We perceive no right in the complainant which may lay claim to the interposition of a court of equity for its protection."

Comment upon such an opinion is in this case unnecessary.

The next case is that of Earll v. Chicago, 136 Ill. 277.

The opinion of the court, on page 288, contains the following:

"Where there is a special trust in favor of an adjoining property holder, or a special injury, a bill or suit may be maintained by an individual in respect to a public street or highway. City of Chicago v. Union Building Association, 102 Ill. 379; McDonald v. English, 85 Id. 232; Ottawa Gas-light Co. v. Thompson, 39 Id. 598."

The controversy in which this language is used is stated upon page 283 to be as follows:

"This controversy grows out of a bill filed by the appellant, against the city of Chicago and others, for the purpose of establishing her title to said piece of ground fronting

thirty-three feet on Oakley avenue and running back, of a uniform width, in a westerly direction, one hundred and ten feet. Such proceedings were had in the cause as that the appellee, Jackson, upon his own petition, was allowed to answer and make defense to the original bill, and was also permitted to prosecute a cross-bill or cross-petition, the prayers of which were, that the quit-claim deeds to the thirty-three feet of land should be set aside, appellant required to remove her fence, the land declared to be a part of Wilcox street, appellee declared to have a perpetual easement therein as a part of such street, and appellant perpetually enjoined from inclosing or obstructing, or claiming ownership in, said piece of ground."

The next case to which our attention is called is that of the Maywood Co. et al. v. Village of Maywood et al., 118 Ill. 61.

On page 65 is a statement of what the controversy was concerning :

"This is a bill brought in the Superior Court of Cook County, by appellees against appellants, for the purpose of having a certain square in said village, known as block 58 (except certain hotel grounds in the northwest corner thereof), declared to be a public park; and praying that appellant company surrender the control and management thereof to the trustees of said village, and that a trust deed, executed thereon by the company to Botsford, trustee, be set aside, and that appellants be enjoined from interfering with the use of said square as a public park by the said village and its residents and lot owners, and from selling or conveying the same, or taking any steps to foreclose the trust deed thereon, etc. The beneficiaries in the trust deed were made parties under the name of "unknown owners."

Upon page 72 the court said: "A court of equity has jurisdiction to entertain the bill filed in this case. As a foreclosure of the trust deed would probably result in the ownership of the "park" by private parties, there was a threatened perversion of the trust, upon which the property was held. Equity will interpose to prevent the perversion

of a trust. (*City of Jacksonville v. Jacksonville Ry. Co., supra.*) Again, the evidence shows a threatened nuisance, tending to deprive appellees and others of the full and free use of this park, as they were entitled to have it used. This is a well recognized ground for equitable interposition. *Zearing v. Raber, supra.*"

In the case at bar no intended perversion of the trust is charged, neither is it alleged that appellant is about to be deprived of the full and free use of the street in question.

Our attention is next called to the case of *McKenzie v. Elliott*, 134 Ill. 156. This case was a contest over a right to a private right of way. The case of *Bez v. The Chicago R. I. & P. R. R. Co.*, 23 Ill. App. 137, is next called to our attention.

Upon page 140 the court said: "In cases like this, we think, although the fee of the street may be in the city, yet, the city having no power to grant the privilege, the appellant had a right to file this bill in equity to prevent the erection of a nuisance in the public highway, opposite her premises, and which closed out her ingress and egress in a great measure to and from the front of her property, as is stated in the bill, rendering her property practically worthless. *Green v. Oakes*, 17 Ill. 249; *Craig v. People*, 47 Ill. 487, 496; *C. & W. I. R. R. Co. v. Dunbar*, 100 Ill. 110."

In the bill of appellant filed in the case at bar, it is not alleged that ingress or egress to his property will be in any measure obstructed by the proposed railway.

Our attention is next called to the case of *Carter v. The City of Chicago et al.*, 57 Ill. 283. The court in the opinion upon pages 286, 287 and 288, said: "The facts alleged in this bill, of themselves, without any specific allegation of fraudulent design, wantonness or oppression, show as clear a case of gross abuse of power and oppression as could all be described upon paper.

In cities the sidewalks are considered a part of the public streets, and as such, are to be kept, like the streets themselves, in a safe and convenient state of repair through their entire width.

The acts begun and threatened, and whose consummation this bill seeks to prevent, are both the destruction and permanent deprivation, by the board of public works and other city authorities, of a sidewalk upon the west side of Franklin street, while one of unusual width is given upon the east side; and this through mere wantonness, oppressive abuse of power, breach of trust, and a fraudulent scheme and design on the part of the city and board of public works to injure, annoy and oppress the plaintiff and other property-owners favored with these court yards. And what seems strange is, that at this age of equity jurisprudence, there should be doubt as to the jurisdiction of a court of equity to grant relief; yet that is the only question really involved in this case."

"The question for decision is not whether a court of equity will interfere with the exercise, within its proper limits, of a public political power vested in the city, which necessarily involves the greatest discretion, but whether, in the case of a plain departure from the power which the law has vested in it, and from fraudulent and malicious motives, it is, by the use of property which it holds in trust for the benefit of the public, about to do an irreparable injury to the property of individuals, a court of equity will intervene to prevent such injury."

The facts of this case are certainly very different from anything appearing in the present. The case of *Green v. Oakes*, 17 Ill. 249, to which our attention is next called, was a bill in chancery to enjoin the obstruction of a public road, it appearing that the appellee had avowed his purpose to obstruct the same by fences and gates at two different points. No threatened obstruction to the public street is charged by the appellant.

The case of *Stetson v. C. & E. I. R. R. Co.*, 75 Ill. 74, was a bill to restrain a railroad company from constructing and operating its road in a street until damages to adjacent lots should be ascertained and paid. The court, on page 75, said :

"It may be regarded as the settled rule of this State, that

an owner of an abutting lot can not prevent the use of a street for a railway when such use is permitted by the city and is authorized by an act of the legislature."

And upon page 60, the opinion goes on: "Holding, as we do, there is no ground for the interference of a court of equity, * * * the injunction was properly denied, and the decree dismissing the bill will be affirmed."

The case of *Craig v. The People of the State of Illinois ex rel. Neville*, 47 Ill. 487, to which our attention is next called, was one in which a bill was filed by the state's attorney against appellants, to enjoin them from closing a certain road and certain bridges so as to interfere with the free use of the same by the people. The attorney general, as before stated, is the proper person to represent the public in cases of this kind.

The case of *C. & W. I. R. R. v. Dunbar*, 100 Ill. 110, was a bill in equity to restrain a railroad from further proceeding in the construction of its road, and in certain condemnation proceedings which they had instituted against the complainant.

The Superior Court of Cook County heard the case upon the bill and answer, and entered a decree *pro forma* that the ordinance under which said railroad was operating was illegal and void upon its face; that said ordinance is also illegal and void because no petition of property owners was filed prior to its passage; that the passage of a valid ordinance locating the precise route of the railroad and consenting to the crossing of the streets and alleys upon such route is a condition precedent to the exercise by the railroad company of the power of eminent domain to acquire property within the city.

The opinion of the court on page 125 opens with this sentence: "The decree in this case is clearly erroneous."

The case of the *Wiggins Ferry Co. v. E. St. L. U. Ry. Co.*, 107 Ill. 450, to which our attention is next called, was, as appears in a statement of the opinion of the court, concerning the following matter:

"This suit is brought upon the legal hypothesis that the

permission of the municipal authorities alone did not authorize the company to construct and operate its road in one of the public streets of the city, in the manner and for the purposes proposed, alone, but that in addition to this the company was bound to obtain the assent of the requisite number of the abutting property owners, which it is conceded was not done in this case. The trial court held, as a matter of law, that under the circumstances of this case it was not necessary to obtain the assent of the abutting lot owners, or any portion of them, to warrant the company in constructing and operating its road in the manner proposed; that for such purpose the grant of the right of way by the city was all that was required; and this ruling of the trial court presents the main question for determination on this appeal." The decree of the Circuit Court was affirmed.

Numerous cases in other States in support of the contention of appellant that in such a case as this a property owner who sustains no damage not common to the public may restrain the public use of a common highway for purposes not inconsistent with the trust for which it is held, have been cited. We have not seen fit to examine all of these. We are aware that outside the State of Illinois authorities may be found sustaining the position of appellant; but life is too short and the time of this court with other matters too much occupied to permit us at this time to do more than to examine, as we have, the long list of Illinois authorities cited by appellant, none of which sustain his contention.

While an abutting property owner can not assume to represent the public, and by his individual suit conclude its rights, (Davis v. Mayer, 2 Duer 663; Winterbottom v. Lord Derby, 2 Law R. Exch. 316; Hartshorn v. South Reading, 3 Allen 501; McDonald v. English, 85 Ill. 232; High on Injunctions, Sec. 762; Pomeroy's Eq. Juris., Sec. 1379; City of East St. Louis v. O'Flinn, 119 Ill. 200; City of Chicago v. Union Bldg. Assn., 102 Ill. 379; Patterson v. C. D. & V. Ry. Co., 75 Ill. 588; Vanderpool et al. v. The West & South Towns Ry. Co., Chicago Legal News, March 24, 1894,) for

damage special and peculiar to himself, he has, under the constitution and laws of this State, a remedy at law. The fact that by permission to use the street for a particular purpose an abutting property owner will be specially damaged, affords no ground for restraining such use so long as the property holder is able to recover and collect all the damage he suffers. *Vanderpool v. The West & South Towns Ry. Co.*, *supra*; *Loire v. North Chicago St. Ry. Co.*, 32 Fed. Rep. 270; *People v. Kerr*, 27 N. Y. 188; *Moses v. Pittsburg R. R.*, 21 Ill. 516, 523; *Stetson v. C. & E. I. R. R.*, 75 Ill. 74; *Patterson v. C. D. & V. R. R.*, Id. 588; *Peoria, etc., R. R. v. Schertz*, 84 Ill. 135; *C. & E. I. R. R. v. Loeb*, 118 Ill. 203; *C. & E. I. R. R. v. Ayers*, 106 Ill. 511; *Pittsburg & Ft. Wayne R. R. v. Reich*, 101 Ill. 511; *C. & E. I. R. R. v. McAuley*, 121 Ill. 161; *Penn M. L. I. Co. v. Heiss*, 141 Ill. 35, 58, 59; *Tibbets v. The West and South Towns St. Ry. Co.*, 54 Ill. App. 180; *Same v. Same*, 38 N. E. Rep. 664; *North Chicago St. Ry. Co. v. Cheetham*, Ill. App. Opinion filed April 4, 1895.

The decree of the Circuit Court sustaining the demurrer to and dismissing the bill is affirmed.

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Charles B. Farwell v. Bessie McLeod Sturges and James H. Wilkerson, Administrator of William Sturges.

1. *STATUTES—Construction of the Act to Enable Parties to Avoid Delay in the Administration of Justice.*—The provisions of section 1 of the "act to enable parties to avoid delay in the administration of justice," requiring the agreement by which matters in controversy are submitted for determination "to be entered of record," are directory only, and not jurisdictional.

2. *SAME—Construction of the Clause "To be Entered of Record."*—It is a sufficient compliance with the provisions of section 1 of the act, "to enable parties to avoid delay in the administration of justice," requiring the clerk to enter the agreement of submission of record, to spread the same upon the records of the court as a part of the final decree.

3. *ACT TO ENABLE PARTIES TO AVOID DELAY IN THE ADMINISTRATION*

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OF JUSTICE—*What to be Submitted Under.*—All matters which under our system are cognizable either at law or in equity, are susceptible of submission to the judge of the court for determination under this statute.

4. EQUITY PRACTICE—*Ordering Money Paid to Persons Not Parties to the Suit.*—Moneys found to be equitably due from one to another of the parties to the proceeding, may be ordered, in a suit in equity, to be paid to one who is not a party to the suit, but who, as between himself and the party to whom the money is found to be due, is equitably entitled to it.

Submission Under the Act to Avoid Delay in the Administration of Justice.—Error to the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed April 22, 1895.

STATEMENT OF THE CASE.

This was a proceeding wherein certain matters in controversy were submitted to the Honorable Murray F. Tuley, one of the judges of the Circuit Court of Cook County, under the provisions of an act approved June 17, 1887 (Hurd's Rev. Stat. Ill., 1891, Secs. 100 and 101, Chap. 110, entitled Practice), which are as follows:

"Sec. 1. That any two or more persons or corporations may appear in person or by attorney in any Circuit Court (or in the Superior Court of Cook County) and submit to any judge thereof, orally, and without formal pleadings, any matter in controversy, having first entered into a written agreement (to be entered of record) and substantially in the following form, to wit:

In the Circuit Court of — County.

First. We (here insert names) do hereby mutually agree to submit to Judge (here insert name) of said court, certain matters in controversy between us for his determination, without a jury, he to hear the same forthwith and to enter the judgment or decree of the court therein within (here insert number of days or 'forthwith') days after such hearing is concluded.

Second. That said judgment or decree shall contain a statement as to what matters in controversy were so submitted, and such statement thereof shall be conclusive.

Third. That no record except of this agreement and of such judgment or decree shall be made as to the matters in controversy so submitted, or as to the proceedings had on the hearing thereof.

Fourth. That such judgment or decree may be enforced in like manner as other judgments and decrees of such court.

Fifth. That we each to the other hereby waive all right of appeal from such judgment or decree, and release all errors that may intervene in the hearing of the matter so submitted, and in the entering of the judgment or decree therein, and agree that this release of errors may be pleaded in bar of any writ of error that may be sued out as to such judgment or decree.

Witness our hands and seals, this — day of ———, A. D.

[SEAL.]

[SEAL.]

Such agreement shall be signed by the parties in person or by duly authorized attorney in fact, and when so executed shall be of binding force upon the parties thereto in all the courts of this State.

Sec. 2. It shall be the duty of such judge to proceed and in a summary manner to hear and determine the matters so submitted, and he shall enter a judgment or decree therein within the time fixed in said agreement, which said judgment or decree shall be final and conclusive, and may be enforced in like manner as other judgments or decrees of such court, but no appeal shall be allowed therefrom."

The agreements recited in the decree here following were never entered of record except as they were spread of record as a part of the decree, and, unless the paper that has been filed here as a supplemental record be treated as a part of the record in the cause, what is contained within the decree comprises all that there is of the record.

The transcript certified to this court by the clerk of the Circuit Court, is as follows:

"In the Circuit Court of Cook County, State of Illinois.
In the matters in controversy between William Sturges

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and Bessie McLeod Sturges, separately, of one part, and John V. Farwell, Charles B. Farwell, Abner Taylor and the Capitol Freehold Land and Investment Company, Limited, of London, England, all or either of them, separately or jointly, of the other part.

This cause coming on to be heard upon the agreement of submission herein, which is as follows:

In the Circuit Court of Cook County, State of Illinois.

In the matter of difference between William Sturges, or Bessie McLeod Sturges, of the one part, and John V. Farwell, Charles B. Farwell, Abner Taylor, and the Capitol Freehold Land and Investment Company, Limited, of London, England, all or either of them, separately, or jointly, of the other part.

Submission of controversy to the Hon. M. F. Tuley, as judge of the said court, as provided by statute, and in pursuance of stipulation, following:

STIPULATION OF SUBMISSION.

IN THE CIRCUIT COURT OF COOK COUNTY, }
STATE OF ILLINOIS. }

First. We, John V. Farwell, Charles B. Farwell, Abner Taylor and the Capitol Freehold Land and Investment Company, Limited, of the one part, and William Sturges on the other part, do hereby mutually, jointly and severally, agree to submit to Judge Murray F. Tuley of said court certain matters in controversy between us for his determination, without a jury, he to hear the same within such reasonable time as may be proper for such hearing, and to enter the judgment or decree of the court therein within a reasonable time after such hearing shall be concluded. (That the matters submitted herein shall include all matters of difference whatsoever between the parties of the one part, or either of them, and the parties of the other part or either of them, excepting only the matters at issue between Bessie McLeod Sturges and the said John Farwell in a certain cause pending in the United States Circuit Court for the Northern District of Illinois.)

All other suits or proceedings of every name and nature between the parties of the one part, or either of them, shall be dismissed, discontinued and withdrawn, without prejudice to the rights of any party hereto.

Second. That said judgment or decree shall contain a statement as to what matters in controversy were so submitted, and such statement thereof shall be conclusive.

Third. That no record, except of this agreement, and of such judgment or decree, shall be made as to the matters in controversy so submitted, or as to the proceedings had on the hearing thereof.

Fourth. That such judgment or decree may be enforced in like manner as other judgments and decrees of such court.

Fifth. That we, each to the others, hereby waive all right of appeal from such judgment or decree, and release all errors that may intervene in the hearing of the matter so submitted, and in the entering of the judgment or decree in bar of any writ of error that may be issued out as to such judgment or decree.

Witness our hands and seals this 23d day of May, A. D.

1892. (Signed) JOHN V. FARWELL,	[SEAL.]
CHARLES B. FARWELL,	[SEAL.]
ABNER TAYLOR,	[SEAL.]
THE CAPITOL FREEHOLD LAND	
AND INVESTMENT COMPANY,	[SEAL.]
WM. STURGES.	[SEAL.]

Stipulation between Bessie McLeod Sturges and John V. Farwell, whereby the matters involved in the suit in Marquette county, Michigan, as shown in the pleadings hereinbefore set out, are submitted for adjudication in this proceeding.

It is stipulated between John V. Farwell, by his solicitor, George F. Westover, of the one part, and Bessie McLeod Sturges, joined with William Sturges, of the other part, as follows:

Whereas, on the day 1891, the said Bessie McLeod Sturges filed her bill of complaint against John V. Farwell, Richard P. Travers and William Sturges in the Circuit Court of Marquette County, in the State of

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Michigan, wherein the said Bessie McLeod Sturges claimed a certain interest or equity of redemption in certain lots or real estate, situated in the said county of Marquette and State of Michigan.

And whereas, in the year 1892, the said John V. Farwell, together with Charles B. Farwell, Abner Taylor and the Capitol Freehold Land and Investment Company, limited, of the one part, entered into an agreement in writing with the said William Sturges, whereby, as provided by the statutes of the State of Illinois, the said parties agreed to submit to Murray F. Tuley, a judge of the Circuit Court of Cook County, in the State of Illinois, all matters of difference between the said William Sturges and the said John V. Farwell and others, and each of them, said matters to be heard by the said Murray F. Tuley without a jury.

And whereas, in consideration of the agreements herein contained, the said Bessie McLeod Sturges is to dismiss her said bill of complaint filed in the Circuit Court of Marquette County, in the State of Michigan, as aforesaid.

Now, therefore, it is hereby agreed that the said Bessie McLeod Sturges shall dismiss the said cause pending in the said Circuit Court of Marquette County as aforesaid, and that all the matters in controversy therein, and all the other matters in controversy, if any, between the said Bessie McLeod Sturges and said John V. Farwell, or between said Bessie McLeod Sturges and either of the other parties to the said agreement of submission to the said judge of the Circuit Court of Cook County as aforesaid, shall be and hereby are included within the said submission, and shall be and hereby are submitted to the said Murray F. Tuley, to be heard and adjudged by him at the same time and under the same conditions, specifications and stipulations, as he shall hear and adjudge the matters to be submitted to him by the stipulations of the said William Sturges and the said John V. Farwell and others already entered into as aforesaid.

(Signed) BESSIE McLEOD STURGES,

JOHN V. FARWELL,

By GEORGE WESTOVER,

His Attorney.

SEPTEMBER, 1893.

And the said parties to the said agreements of submission and to the cause being present with their respective solicitors and attorneys, and the court having obtained full jurisdiction of said parties and of the matters in controversy between them, and having heard the evidence, both oral and written, produced and offered by said parties, respectively, and having heard the arguments of the respective counsel and attorneys, and being fully advised in the premises, doth find, determine and adjudge and decree as follows :

That the matters in controversy between said parties and so submitted by the said parties to the said two agreements of submission for the final determination and adjudication of this court are found, adjudged and decreed to be as follows :

1st. As to the respective right, title and interest of the said William Sturges and the said John V. Farwell, Charles B. Farwell and Abner Taylor, hereinafter referred to as the 'Syndicate,' in and to a certain contract made between the said persons composing said syndicate and Kensington & Company, bearing date the 13th day of July, 1885, which said contract is as follows :

The Kensington contract between Kensington & Co. and John V. Farwell, C. B. Farwell and Abner Taylor, July 13, 1885.

Memorandum of agreement, made on the 13th day of July, 1885, between John Villiers Farwell, of Chicago, in the United States of America, but now temporarily residing at No. 49 Dover street, Picadilly, in the county of Middlesex, merchant; Charles Benjamin Farwell, of Chicago aforesaid, merchant, and Abner Taylor, also of Chicago aforesaid, merchant, of the one part, and Kensington & Co., of No. 1 George street, Mansion House, in the city of London, advertising contractors, of the other part. Whereas, by an agreement made on or about the 1st day of June, 1885, between the said Abner Taylor of the first part, John Villiers Farwell and Charles Benjamin Farwell of the second part, and William Chase Prescott, as manager for

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and trustee on behalf of the Capitol Freehold Land and Investment Company, Limited, of the third part, the said Abner Taylor sold, and the company purchased, certain lands situate in the Pan Handle of Texas, therein particularly described, at the price therein mentioned. And whereas, by an agreement bearing even date herewith, and made after the making hereof between the company of the one part and the said Kensington & Company of the other part, the company agrees with the said Kensington & Company, that the said Kensington & Company shall issue debentures, upon the terms set forth in said agreements. And whereas, John Villiers Farwell, Charles Benjamin Farwell and Abner Taylor, for good and sufficient reasons, are desirous that the said subscription for debentures shall be made as quickly as possible, and have agreed with the said Kensington & Company that in consideration of their entering into the agreements hereinbefore last recited they will allot, or cause to be allotted, or transfer, or cause to be transferred, to the said Kensington & Company, or their nominees, fully paid-up shares in the company, in manner hereinafter provided. Now it is hereby agreed as follows:

1. After setting aside or allotting 13,000 fully paid-up shares, in pursuance of the terms of the agreement of the 1st of June, 1885, in respect to 200,000 pounds worth of debentures, subscribed for in America, and 60,000 pounds worth of debentures to be subscribed for in England, before the prospectus inviting subscriptions for debentures is issued, the parties hereto of the first part shall set aside 37,000 fully paid-up shares, to be disposed of as follows: 3,500 of such shares are to be allotted *pro rata* as bonuses for the applicants for the first 140,000 pounds worth of debentures subscribed for, and 3,500 *pro rata* to the said Kensington & Company, as they may direct, and when the said debentures are subscribed for.

2. If within six months from the date of the issue of the first debenture prospectus the said John Villiers Farwell, Charles Benjamin Farwell and Abner Taylor shall be of opinion that the subscription for debentures are not being

made sufficiently rapid to meet the needs of the company they shall notify such opinion to said Kensington & Company, and shall thereupon be at liberty to themselves take such measures auxiliary to those of the said Kensington & Company, as they may think fit, until 400,000 pounds worth of debentures shall have been subscribed for, but in respect to the debentures subscribed for wholly in consequence of such auxiliary measures, no shares shall be allotted to the said Kensington & Company under this agreement.

3. The residue of the said shares shall be allotted to the said Kensington & Company, or as they may direct, in the proportion of one ten-pound share fully paid up for every twenty pounds of nominal value subscribed for in the debentures, as and when the same shall be subscribed for.

4. If the 260,000 pounds referred to in paragraph 1, or any part thereof, is not raised in manner hereinbefore referred to, the same, or such part thereof as shall not have been so raised, shall form part of the debentures, the subscriptions for which are to be obtained by the said Kensington & Company, and the bonuses of fully paid shares payable in respect thereof, in accordance with the term of the hereinbefore recited agreement of the first of June, 1885, shall be paid to the said Kensington & Company, or as they may direct, but the parties hereto of the first part shall be at liberty to obtain subscriptions for the same; provided always, that if any subscription shall be obtained in Europe otherwise than through the said Kensington & Company, they shall, nevertheless, be entitled to receive the shares they would otherwise be entitled to under this agreement as if they had obtained the said subscriptions themselves.

5. The said Charles Benjamin Farwell, John Villiers Farwell and Abner Taylor undertake and agree that if, in pursuance of sub-section 2, of article 2, of the hereinbefore recited agreement of the first of June, 1885, they shall demand and receive from the company the whole or any part of the 600,000 pounds debentures, that they will not sell or cause the same to be sold in Europe, except through the said Kensington & Company and under the terms of this

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agreement. Provided, however, that the said Charles Benjamin Farwell, John Villiers Farwell and Abner Taylor, may transfer not exceeding 25,000 pounds thereof in payment for stores, machinery or materials supplied to them by any firm, company or person in Europe.

6. And it is hereby further agreed by and between the said parties hereto, that whereas, the said Kensington & Company are entitled to receive from the company two per cent upon the nominal amount of debentures subscribed for, in pursuance of the agreement, bearing even date herewith, and hereinbefore referred to, the said Kensington & Company shall return to the said Charles Benjamin Farwell, John Villiers Farwell and Abner Taylor, shares to which they, the said Kensington & Company, shall be entitled to under this agreement, to a number equal in nominal amount to the sum received by the said Kensington & Company from the company, as and when they shall receive the same; but this condition shall not apply to the two per cent paid to the said Kensington & Company in respect of any debentures subscribed for, solely through the parties hereto of the first part, in pursuance of articles 2 and 4 thereof.

7. In the event of any of the applicants for the debentures of the company, desiring to receive interest upon the amount advanced by them at the rate of seven per centum per annum in lieu of five per centum, with a bonus in fully paid shares, then the said Kensington & Company shall not be entitled to receive any portion of the said bonus, which would have been paid to such applicants, but the same shall belong to the said John Villiers Farwell, Charles Benjamin Farwell and Abner Taylor, but Kensington & Company shall be entitled to receive the amount of the shares payable to them in pursuance of this agreement as if the bonus had been paid to the applicants.

As witness the hands and seals of the said parties :

JOHN V. FARWELL, [SEAL.]

CHARLES B. FARWELL, [SEAL.]•

By John V. Farwell, his attorney in fact.

ABNER TAYLOR, [SEAL.]

By John V. Farwell, his attorney.

Signed, sealed and delivered by the within named John V. Farwell, Charles B. Farwell and Abner Taylor, in the presence of Traves T. Briant, clerk to Snell, Son & Greenip, solicitors, 1 and 2 George Street, Mansion House, London, E. C.

Which said contract was on the fifth day of March, 1886, assigned by the said Kensington & Company to the said William Sturges; and as to what pay, if any, said Sturges was to receive from the said syndicate, or the members thereof, for his services and expenses in connection with said contract or acts done thereunder, and also as to what interest, if any, said Bessie McLeod Sturges has or had in the contract, or in the remuneration, if any, which the said syndicate was or may be found liable to pay to the said William Sturges in connection therewith.

2d. As to the liability, if any, of the said Capitol Freehold Land & Investment Company (hereinafter referred to as the Capitol Company) to the said Sturges for services rendered by said Sturges in or about the promotion and organization of said company, or rendered to said company since the date of its organization, or in or about the selling of the debentures of said Capitol Company, or in or about its business, and what claim, if any, said Sturges has to any shares of stock of said Capitol Company.

3d. How much, if anything, is due and owing to said William Sturges from the said syndicate, or any member thereof, for services performed or expenses incurred for said syndicate, or any member thereof, for services performed or expenses incurred for said syndicate, or for said Capitol Company, in or about the promotion of said Capitol Company, or in or about the sale of its debentures, or in or about the business of said Capitol Company from the commencement of the year 1884 down to the present time, and also what sum of money or other consideration, if any, was due and owing to said William Sturges for services performed during said last mentioned period for the said syndicate in efforts to sell lands for said syndicate, or to raise money by mortgage upon certain lands owned by said syn-

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dicate under a certain contract for the building of a state house for the State of Texas, and for services on behalf of said syndicate in connection with the promotion and organization of said Capitol Company, the selling of its debentures and attending to the interests of said syndicate in any other way or manner during said period, or for any services rendered or expenses incurred in any way or manner by the said Sturges for the said syndicate from the year 1883 down to the present time.

4th. What sum of money, if any, is due upon a certain alleged loan of \$140,000, made by the said John V. Farwell to the said William Sturges, for which said Sturges gave his note dated June 24, 1889, payable in one year with six per cent per annum interest, secured by collaterals with power of sale, and collateral securities, being 6,136 shares of stock in the said Capitol Company and seven shares of stock of the Sonora Land Company.

5th. As to who is the owner and entitled to a certain sum of \$18,000, deposited with John V. Farwell & Company or to the credit of said John V. Farwell, which were part of the proceeds of a certain sale made by one Travers of certain property known as a part of the Grace Furnace property, and as to how the said sum of money should be applied in the accounting among the parties hereto; also, as to the amount paid said William Sturges, or to others for him, from time to time, upon account of his said claim for services, in money, stocks, or a transfer of property, real or personal, to, for or on behalf, or at the request of said Sturges.

6th. As to whether certain eighty lots in Smith Moore's Addition to the city of Marquette, State of Michigan, belonged to the said Bessie McLeod Sturges, or to the said John V. Farwell, or to any other or others of the parties hereto, and as to what claims or equities said John V. Farwell has against said property by reason of the payment of taxes or otherwise.

7th. As to the rights and equities existing between the said syndicate and the said William Sturges, and as between

the respective parties to this submission growing out of the said mentioned services of said William Sturges and said fifty per cent Kensington contract and a certain rebate agreement connected therewith, and growing out of certain arbitration agreements made between said Sturges and his claims as to the said contract of the Kensington company, which was assigned to him as hereinbefore mentioned.

8th. And all matters in controversy between the parties to said agreements of submission, and their rights and equities respectively in the matters hereinafter concerning which there are any findings or adjudications.

The court finds the substantial facts which are necessary to be set out in this decree to be as follows :

That in 1883, John V. Farwell, Charles B. Farwell and Abner Taylor, known as the 'Syndicate,' were the owners of a certain contract with the State of Texas, whereby, in consideration of 3,000,000 acres of land, to be deeded to them or their assigns by the said State of Texas, from time to time as the work progressed, they agreed to erect a state house or capitol building for said State, according to certain plans and specifications; that in 1883 some efforts were made by the syndicate to raise money for the erection of the state house by a sale of the lands, or by borrowing upon them as security, in the United States, and that John V. Farwell, while in Europe, in that year, made some efforts in the same direction in England, but that all said efforts during said year were failures.

Said syndicate commenced work on the foundation of said state house with money furnished by the syndicate itself, and the evidence tends to prove that by May 1, 1884, the syndicate had expended several hundred thousand dollars in the work, and was very anxious to raise the money necessary for its further prosecution, either by the sale of the land or by borrowing upon the same.

In March, 1884, John V. Farwell, who acted as the financial manager of the syndicate, met the said William Sturges (who was then on his way to Europe to promote certain water works, patented gas and other schemes in which he

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was interested) in the city of New York. The parties were well acquainted, on friendly terms, had been interested in several speculative schemes before that time, and said Sturges had become, by reason thereof, indebted to the said John V. Farwell in something more than \$100,000. In a conversation that was had with him in regard to the affairs of said syndicate, in connection with the building of said state house, Sturges offered his services to bring the matter to the attention of English investors, and see what could be done in Europe as to selling the lands or raising money upon them by way of security, and proffered to do the same without expense to Mr. Farwell or the syndicate. No definite scheme was formulated, but it was understood between them that the syndicate preferred to give a proportion of the shares of the stock in any company based upon the ownership of the 3,000,000 acres of land, to any person or syndicate who would furnish money to erect a capitol building, rather than to borrow upon any bonds to be issued upon the security of the land.

Farwell furnished Sturges with certain letters of introduction to Stuart & Company and others. Sturges remained in England from the spring of 1884, until the next January, reporting by letter to John V. Farwell his efforts to introduce the scheme and to form a company or corporation to raise the money required, and as to his success in obtaining from time to time, promises to take stock or bonds in connection with any company that might be formed.

And the court finds that Sturges was earnest and diligent in his efforts to float some scheme by which the money could be raised for the syndicate. His only authority was to entertain proposals or schemes and submit the same to the syndicate; he had no authority to bind the syndicate in any way.

In January, 1885, Sturges returned to America and reported to the syndicate what he had done and submitted a scheme for organizing a company, and claimed that he had secured promises from capitalists to subscribe for over \$700,000 of the stock of the proposed company. This scheme

did not meet with the approval of the syndicate. The syndicate thereupon determined that John V. Farwell should return to England with Sturges and get up some scheme or plan for organizing a company in England upon a basis which should be satisfactory to said Farwell, the other members of the syndicate giving said Farwell a general power of attorney to act for them.

While Sturges was in England in 1884, the syndicate were making efforts to raise money in America, and also efforts to raise it in Germany, but all such efforts failed, and all attempts further in that direction were abandoned, when it was determined that Farwell and Sturges should return to England.

In March, 1884, the two went to London, and upon interviews with a Mr. Stuart, Mr. Brogden and others, who had become interested in the proposed scheme of Sturges, they were notified that the scheme proposed by Sturges was not acceptable to the syndicate.

The court further finds that various efforts were made and schemes proposed for the raising of the money, varying in amount from three to five millions of dollars, in all of which Sturges assisted Mr. John V. Farwell, and that these efforts resulted finally in the formation of the said Capitol Freehold Land and Investment Company, the preliminary organization of which was made June 1, 1885. The capital stock was to consist of 300,000 shares of ten pounds each, but only 200,000 were to be issued, and one million pounds of bonds to be issued upon the land, which was to be transferred to a trustee as security.

The court further finds that the labors of Sturges in 1884 were utilized in the formation of said Capitol Company, and were of much advantage in that connection.

The court further finds that in getting up the scheme of said Capitol Company the services of one Edward Kensington as a promoter and agent thereof, were obtained largely through the efforts of said Sturges, and that, on or about the 13th day of July, 1885, the said Edward Kensington, under the name of Kensington & Company, made an agree-

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ment of that date with said Capitol Company, to obtain subscriptions for the 1,000,000 pounds of debentures (less a small proportion thereof, which it was claimed had already been subscribed), for and in consideration of two per cent commission upon the amount of debentures sold, or subscriptions therefor obtained by the said Kensington & Company, they to pay certain specified expenses of advertising, etc., connected with the selling and promoting the sale of such debentures. This contract will be referred to hereafter as the 'Two per cent Contract.'

The court further finds that on the same day the said syndicate entered into the said contract with Kensington & Company, hereinbefore set forth, by which the said Kensington & Company agreed to take pay for selling said debentures in shares of stock, which contract will be hereafter referred to as the 'Fifty per cent Kensington Contract.'

The court further finds that contemporaneously with the making of the said two contracts a verbal agreement was entered into between the said Farwell, representing said syndicate, and the said Kensington, known as the 'Rebate Contract,' to which agreement the said William Sturges was also a party; by this rebate agreement the profits and emoluments to be received upon the fifty per cent Kensington contract were to be divided between Kensington & Company and William Prescott, John V. Farwell and William Sturges, each to take one-quarter, and that, as soon as the first issue of 400,000 pounds of debentures was floated the agreement should be reduced to writing and run from said Kensington to said Sturges, who, it was agreed, should immediately assign the same to said John V. Farwell, with the understanding that the said Sturges' one-quarter interest should be held by said Farwell to pay him, said Farwell, all indebtedness owing him by said Sturges, and that whatever was left over was to go to Mrs. William Sturges—the said Bessie McLeod Sturges.

The court further finds that it is not clear from the evidence whether or not the one-quarter interest to go to said

William Prescott was for his benefit or for that of John V. Farwell, representing the syndicate.

And the court further finds that said rebate agreement was made by said John V. Farwell for and on behalf of and for the benefit of said syndicate.

The court further finds that in the preliminary organization of the Capitol Company, Sturges was made one of its directors, which place he resigned on the 21st of August, 1885, and by power of attorney of the same date, Sturges was authorized to act for John V. Farwell in his absence, the said Farwell having theretofore been elected a director of said company. That said Sturges did represent said Farwell at several meetings of the board of directors by virtue of said power of attorney up to the 21st of July, 1885. That about the first day of September, 1885, the said Farwell returned to America, leaving Sturges in England, under said power of attorney, as his representative in said board of directors, and also looking after the interests of the syndicate in connection with the affairs of the said Capitol Company; that said Sturges remained in England, assisting in efforts to float the new company and looking after the interests of the syndicate.

The court further finds that the debentures were sold by Kensington & Company with reasonable rapidity, and the success of the scheme appeared to be very promising.

The court further finds that immediately on his return to America said Farwell commenced importuning said Sturges by letter to get the rebate contract executed and forward it to him; that he made repeated unsuccessful efforts of that kind until January, 1886, when he, in company with the late Judge Drummond, sailed for England.

Shortly after the arrival in England of said Farwell and said Judge Drummond, Kensington demanded of Farwell a conveyance of certain shares of stock before the time he, Farwell, thought Kensington & Company were entitled to the same, which demand Farwell refused, and in turn demanded of Kensington the execution of the rebate agreement. Kensington refused to execute any such rebate

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agreement, and thereupon Kensington & Company's power to sell said bonds was revoked.

The court further finds that the execution of the Kensington fifty per cent contract and of the rebate agreement had been kept a profound secret by the parties interested, from the officers and directors of the Capitol Company and its debenture holders, and that to have made the same then public, would have resulted in stopping the sale of the debentures and probably in the ruin of the company, and also would have resulted in very serious injury to the syndicate because of their guaranty in connection with the debentures, of which about 400,000 had then been issued; that John V. Farwell thereupon contemplated the abandonment of a London corporation and a new reorganization in America, but before taking any steps in that direction he was induced by Sturges, Drummond and others, to get rid of Kensington & Company, if possible, by buying out their interest under their two contracts. It appears that either because Farwell thought Sturges was a better person to make the negotiation, or because Sturges represented to Farwell that Kensington was so angry with Farwell that he would not treat with him, that he, Sturges, was selected to make the purchase. Sturges negotiated with Kensington with the result that for 16,000 pounds in debentures of the Capitol Company, furnished him by John V. Farwell, he purchased both the two per cent and the fifty per cent Kensington contracts, and took an assignment thereof to himself. At or about the same time, and as a part of the same transaction, William C. Prescott executed an assignment of his interest in the fifty per cent contract to Sturges, in which it is stated that such interest was one-quarter interest. For this latter assignment but a nominal sum (about five pounds) was paid. The Capitol Company immediately appointed a large number of agents throughout Great Britain, and commenced to push the sale of the debentures, principally through the efforts of its secretary, the said Prescott, assisted by its board of directors. The company having organized its corps of agents, and meeting with rea-

sonable success in the sale of the debentures, John V. Farwell and Sturges, together with Judge Drummond, in April, 1886, departed for America. It appears that upon the purchase of the Kensington contracts being consummated, Sturges wanted to know of John V. Farwell what he was going to allow him, Sturges, as compensation for his services, but Farwell evaded the question by saying he intended to be more liberal with him than he, Sturges, could expect. In April, 1886, a few days after their arrival in America, Farwell requested Sturges to deliver over to him the Kensington contract, which Sturges refused to do, and claimed that he, Sturges, owned the same, or fifty per cent thereof. It appears that April 22, 1886, John V. Farwell, in order to avoid any discussion then as to the matter (his partners in the syndicate apparently being ignorant of the claim of Sturges), offered to put in writing his (Farwell's) view of the then situation, and of the amount in stock Sturges should receive when the whole matter should be floated, and Sturges to do the same, Mr. Buckingham to hold Sturges' statement, and Judge Drummond to hold Farwell's, and in the case of the death of either before settlement should be made, the said two parties to break the seals and decide between Farwell and Sturges, with power to choose an umpire if they disagreed.

The court further finds that interviews were had, in which all of the syndicate and Sturges participated, and that Sturges claimed at that time one-half of the Kensington fifty per cent contract, and made some threats as to what he would do if his claim was not allowed, or some arrangement made for settling the same by arbitration. It appears that Sturges left rather suddenly, pending the negotiations, and went to New York City, but Farwell got the approval of Judge Drummond to an arbitration agreement which had been talked of, and sent it on to New York City to Sturges with the request that he would execute the same and return it. Sturges not doing so, John V. Farwell, who was at that time a very sick man, went to New York, and the arbitration agreement, dated May, 1886, was signed by John V.

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Farwell and William Sturges, and was indorsed on the bottom, 'The above is satisfactory to me. (Signed), C. B. Farwell.' It does not appear why the other members of the syndicate did not sign the agreement. The said arbitration agreement apparently assumes that the said John V. Farwell, upon the payment of 15,000 pounds, paid Kensington, and provides that the contract shall be indorsed in blank and left in the hands of Drummond and Buckingham 'for the interest of both parties until the business is completed.'

And in the case of disagreement as to a division of the profits to be made on said contract, these two gentlemen were to decide how such division should be made, and declares 'that this contract was and is incomplete as to the interest of said Sturges,' and that the purchase and transfer from Kensington was agreed to by said Farwell on that account and 'for the protection of the interests of all parties.' It also provides that all equities that might arise thereafter, growing out of the services performed or to be performed by either or both of the parties, should constitute a subject for arbitration.

The court further finds that the Kensington contract was incapable of being carried out according to its terms, and was not so carried out or so acted upon; that said Kensington fifty per cent contract was purchased with no intent or expectation that said Sturges would carry out the same as assignee thereof, but was purchased with the view and expectation that the same should cease and be of no effect, and that this was well known to the said Sturges as well as to the said Farwell.

And the court further finds that said Sturges, at the time of said purchase, stood in a fiduciary relation to the said John V. Farwell and to the said syndicate, and, under the law, could not acquire the ownership or control of said contract adversely to the interests of said syndicate without its consent, and that the burden of showing such consent, with full knowledge of all the facts, was and is upon said Sturges.

The court finds that the presumption of law arising from this fiduciary relation that, when he took the assignment of

the Kensington fifty per cent contract, he took the same for the benefit of his principals (the said syndicate), has not been overcome by any satisfactory proof in this case.

The court further finds that the said Sturges had, by reason of his said fiduciary relation, become possessed of a business secret of his said principals, to wit, the making of said contract and the concealment of the same from the directors of said Capitol Company and its debenture subscribers, the divulging of which secret he well knew could and would be of almost incalculable damage to the said Capitol Company and to the said syndicate, and that he used this knowledge, accompanied with threats to divulge such secret and to commence litigation founded upon its possession of the legal title of said Kensington fifty per cent contract, to force from the said syndicate the said arbitration agreement; that there is no evidence in this case of any law of England violated by the Kensington contract, and no evidence of any intent to defraud any one by so doing; that whatever wrong there was, it laid in the concealment from the board of directors, and from those intending to subscribe for debentures, the knowledge of the existence of such a contract; that whether it was a crime and fraud, or merely a moral wrong in the concealment of the existence of the contract, it was a business secret acquired by an employe in the course of his employment, and a court of equity will not permit such an employe to profit by such improper divulgement, or threat to divulge the same to the injury of the principals, and no admissions made in said arbitration agreement should prevail as against the said syndicate unless corroborated fully by other satisfactory evidence, and any doubt which may exist as to the construction to be placed upon any recitals in said arbitration agreements should be construed as strongly as the language will permit of against the said Sturges under the circumstances. The second arbitration agreement which was made between the parties was obtained by said Sturges in like manner, and by reason of like threats. The third and fourth arbitration agreements merely change the arbitrators who act under the first and second.

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The court further finds that said Sturges, after signing said first arbitration agreement, returned to England at the request of said syndicate and rendered service in promoting the sale of debenture bonds until the month of December, 1889, when, the sale of said debentures being practically completed, he returned to America.

The court finds that Sturges had several other schemes in which he was interested on hand during said time, and that while he did not give all his time to the sale of said debentures and looking after the interests of said Capitol Company and said syndicate, he did give the necessary time thereto, and was diligent and faithful in the discharge of his duties in that connection. That during said interval said John V. Farwell made several trips to England upon the affairs of said syndicate and of said Capitol Company, and rendered efficient services. That in all he spent more than two years of said time in England.

The court further finds that in June, 1889, while said Farwell was in England, the said Sturges, by threats of law-suit concerning a certain indorsement of said Farwell of a certain \$40,000 note, the negotiation of which said Farwell had stopped, and by threats against the said Capitol Company made by said Sturges, forced said Farwell into making a loan of \$140,000 to the said Sturges, running for one year, with interest at six per cent per annum, for which said Sturges gave his promissory note, with power of sale of certain collaterals, to wit, 6,136 shares of the stock of said Capitol Company belonging to his wife, Bessie McLeod Sturges, and seven shares of the Sonora Land Company, the said loan having apparently been made to enable said Sturges to purchase a controlling interest in said Sonora Land Company; that in an agreement made at the time of making said loan it was agreed between said Sturges and said Farwell that said advance of money (\$140,000) so loaned should be made an element for consideration in the arbitration between said Sturges and said syndicate, growing out of the Capitol Company's business in London in its final execution by themselves or by the arbitrators, as the case

might be, and in the said agreement it was, among other things, provided that said Sturges should 'neither do nor say anything that is not to the interest of the Capitol Company nor enter into any suits directly or indirectly.'

The court further finds that said first arbitration agreement was never signed by said Taylor, and that said Taylor and said Farwell notified said Drummond, with whom the said Kensington fifty per cent contract was deposited, not to part with said contract, as they claimed it to be the property of the syndicate, and thereby caused the failure of said first arbitration agreement; that by reason thereof said John V. Farwell went to England and was forced by threats of suits and of the ruin that he, Sturges, would cause the said Capitol Company enterprise, into a second arbitration agreement, by which Lord Thurlow, one of the directors, and Mr. Frank Crisp, the solicitor of the Capitol Company, were made arbitrators. The parties afterward, in order to have the arbitration in America, on August 18, 1887, entered into a third arbitration agreement, making Walter Potter and Columbus R. Cummings arbitrators, with Judge Drummond as umpire. After efforts on the part of the syndicate to postpone the arbitration, the death of Judge Drummond necessitated, apparently, the making of a fourth arbitration agreement, which was entered into September 23, 1890, naming E. M. Phelps, J. W. Doane and Lyman J. Gage in place of the arbitrators named in the third agreement.

The court further finds that none of the said arbitration agreements were ever carried into effect, and that the failure to do so was caused by the syndicate or some one or more members thereof.

The court further finds that at the time the third arbitration agreement was made there was also what were known as addenda 'A' and 'B.' In the former it was agreed that the arbitration should not be had or decision made until the remaining debentures of the Capitol Company should be sold, and that by addendum 'B' the said John V. Farwell, in consideration of the postponement of the arbitration until all the said unsold debentures of the Capitol

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Company should be disposed of, releases the said Sturges 'from all obligation due said John V. Farwell on account of previous contracts amounting to over \$100,000, and also delivers to him 150,000 Gogebic bonds as an advance payment on the said award, and agrees to deposit with George F. Westover certain Excelsior Bessemer ore stock to apply at its valuation upon said award at the time said award should be made.' It is admitted that said Bessemer ore stock is now of no value.

The court further finds that the contention of said Sturges, that by said addendum 'B' the said Farwell, solely for the consideration of said postponement, released him from all said obligations amounting to over \$100,000, can not be maintained; that under the circumstances under which said addendum 'B' was made, and under the other facts in this case, it would be inequitable not to allow credit for said obligation so released as an advance payment upon the accounting between the said syndicate and said Sturges in regard to the matters aforesaid.

The court further finds that there is no proof in this case that said Farwell refunded to the said syndicate the 15,000 pounds mentioned in the first arbitration agreement, and that the subsequent arbitration agreements assume that all the members of said syndicate are liable in regard to the matters aforesaid, and the court so finds, notwithstanding any agreement or understanding that did or may exist between the members of said syndicate in that regard, as to which latter agreement or understanding this court makes no finding.

The court further finds that the said Kensington contracts were purchased of said Kensington for cancellation, and that although the said Capitol Company was, by the said Sturges, on September 28, 1886, notified of the assignment of the two per cent contract to said Sturges, and its board of directors agreed to accept him in place of Kensington, he, the said Sturges, 'undertaking to produce the transfer at the next board meeting,' it does not appear from the evidence that said transfer was ever produced to said board until the 13th

of January following, when it appears from the minutes of said board that the said two per cent contract canceled by said William Sturges was laid on the table, and the cancellation ratified by the board of directors.

And the court further finds that the said Sturges performed no services for said Capitol Company under said contract, and is entitled to no claim against said company by reason of said transfer.

The court further finds that no agreement or understanding was ever had between said Sturges and said syndicate as to the compensation for his services rendered in and about the promotion and organization of said Capitol Company, or in or about its business or its interests, or for or on behalf of his services rendered to said syndicate in connection with said Capitol Company, or in or about the interests of said syndicate in the matters aforesaid, except as hereinbefore stated.

And the court further finds that said Sturges does not own the said fifty per cent Kensington contract, but that said syndicate is the equitable owner thereof, and that the same, upon compliance of said syndicate with this decree, should be canceled and delivered to said syndicate.

And the court further finds that had the said Kensington fifty per cent contract, as modified by the said rebate agreement, been carried out, he, the said Sturges, would have been entitled to have and receive for all his services in the promotion and organization and in the business of the said Capitol Company, from the year 1884 up to the time the one million of debentures issued by the Capitol Company should be sold, one-quarter of all the profits realized under said Kensington fifty per cent agreement, to be paid in shares of the said Capitol Company as provided in said Kensington fifty per cent contract.

The court further finds that at the time of the execution of the said Kensington fifty per cent contract, and at the time the same was purchased by said Sturges with the bonds furnished by said syndicate, he, the said Sturges, still owned an undivided one-quarter interest, which he had

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agreed with the said John V. Farwell should be assigned to, and held by said John V. Farwell to pay his, the said Sturges', debt to said Farwell, amounting to over \$100,000, and the remainder, if any, should be held by said Farwell for the benefit of the said Bessie McLeod Sturges, the wife of said William Sturges. And the court further finds that said Sturges, having consented that said last named contract should be purchased for cancellation, it became impracticable to carry out its provisions, and ascertain what number of shares of said Capitol Company, he, said Sturges, would be or was entitled to as owner of one-quarter interest therein, and that under the circumstances, in equity and good conscience, said Sturges is entitled to receive from said syndicate, for the use of his wife, the said Bessie McLeod Sturges, the value of said one-quarter interest over and above the obligations due from said Sturges to said Farwell, upon other and prior contracts between them, such value to be as of the time the said fifty per cent contract was so purchased for cancellation.

And the court finds that this court is not limited to finding the value of said one-quarter interest in shares of stock at the time of said purchase, but may and should find its value in money.

The court further finds that said Sturges' one-quarter interest was then worth, over and above the said debts due from said Sturges to said Farwell, the sum of \$75,000, and that said syndicate should account for and pay the said Bessie McLeod Sturges the said sum of \$75,000.

That because of the wrongful act of said Sturges in claiming to own said Kensington fifty per cent contract, and the use he made of the legal title being in him as hereinbefore substantially set forth or referred to, no interest should be paid on said sum, except from the date of this decree.

The court further finds that said Sturges is entitled to compensation for his services in selling the remainder of the bonds unsold at the time of the purchase of the fifty per cent contract, and for his services rendered in regard to

the business of said Capitol Company; that while he did not have the power given to Kensington under the fifty per cent contract, nor the liability for expenses, he did take the place of the said Kensington as to looking up investors and promoting the sale of said bonds; that, not including the one hundred thousand pounds of the Potter, Lovell & Co. bonds, transferred to the syndicate through Sturges' efforts, the amount of bonds remaining unsold when the Kensington fifty per cent contract was purchased, and subsequently sold by his agents and through the office, was about 498,814 pounds.

And the court further finds that said Sturges, from March, 1886, rendered other services for the benefit of said syndicate, distinct and independent of said services in selling said last named bonds, and also from early in the year 1884, rendered other services to said syndicate, and that said services consisted in specially representing the interest of said syndicate, and acting as its agent, for which he is entitled to compensation, and that said last named services commenced in the year 1884, and ended in the year 1889, and were continuous except for a few months of said time.

And the court finds as to the \$25,000 received from the Travers sale of part of the Grace Furnace property, about \$18,000 of which was deposited with John V. Farwell & Company to the credit of said John V. Farwell, that said Farwell is entitled to retain out of the same the amount due upon a certain promissory note for the sum of \$10,000, executed by said Travers, payable to the order of said John V. Farwell, and that the said William Sturges is entitled to the remainder of the said sum of \$18,000.

The court further finds that said Gogebic bonds delivered to said Sturges for said Farwell, as mentioned in said addendum 'B,' had no appreciable value, and said John V. Farwell nor said syndicate are entitled to any credit therefor as against said William Sturges; that neither the said syndicate nor the said John V. Farwell is entitled to any credit on account of the transfer by said John V. Farwell

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of his interest in the Grace Furnace Company to Walter Potter or to the said William Sturges.

And the court further finds that the said William Sturges is entitled to have and recover of the said syndicate, over and above all just credits and off-sets, either of said syndicate or of said John V. Farwell, for or on account of the matters aforesaid, including therein the balance due said Sturges on said \$18,000, but independent of the amount found due Mrs. Bessie McLeod Sturges as aforesaid, the sum of one hundred and ten thousand five hundred and ninety dollars and forty-three cents (\$110,590.43), to be applied as a credit upon said note of \$140,000.

And the court further finds, as to the said eighty lots in said Smith Moore's Addition, that said William Sturges makes no claim to the same, and admits the ownership of the same to be in said Bessie McLeod Sturges, and that, as between her and the said John V. Farwell and the said Richard Travers, the said Bessie McLeod Sturges is the owner thereof, and is entitled to have and receive from the said John V. Farwell a quit-claim deed thereof, with covenants of warranty against his, said John V. Farwell's, own acts, upon the payment or tender to said John V. Farwell of the sum of \$3,996.82, paid by said Farwell for taxes upon said lots, with interest thereon from the date of this decree. She, the said Bessie McLeod Sturges, having had the benefit of said payment of taxes, but the same not having been made at her request, she should pay no interest thereon except as aforesaid.

It is therefore adjudged and decreed that the said John V. Farwell, Charles B. Farwell and Abner Taylor pay to the said Bessie McLeod Sturges, within ninety days from the entry of this decree, the sum of \$75,000, with interest thereon from the date of the entry of this decree at five per cent per annum, and that, upon the payment thereof, the said contract between the said Farwells and Taylor, of the one part, and Kensington & Company, of the other part, dated July 13, 1885, be canceled and delivered up by the clerk of this court to the said Farwells and Taylor.

It is further ordered, adjudged and decreed that there is due and owing from the said Abner Taylor to the said William Sturges in full for all services rendered as aforesaid on account of the matters and things aforesaid, and submitted to the court as aforesaid, the sum of one hundred and ten thousand five hundred and ninety dollars and forty-three cents (\$110,590.43), to be credited upon the certain promissory note of \$140,000, dated the 24th day of June, 1889, payable one year from its date with interest at six per cent per annum and secured by collateral securities, to wit, 6,136 shares in the Capitol Freehold and Investment Company of London, said shares being ten pounds sterling each, and being the property of the said Bessie McLeod Sturges; and seven shares of the Sonora Land Company, of Chicago, the property of the said William Sturges.

And it is further ordered, adjudged and decreed that there is due and owing to the said John V. Farwell and for the benefit of said syndicate upon said promissory note for \$140,000, the sum of twenty-nine thousand four hundred and nine dollars and fifty seven cents (\$29,409.57), and that the said William Sturges pay said last named sum to the said John V. Farwell for the use as aforesaid, within ninety days from the entry of this decree with interest from the entry of this decree at the rate of five per cent per annum; and that unless said William Sturges, or some one in his behalf, shall pay to said John V. Farwell for the use, etc., the said sum of twenty-nine thousand four hundred and nine dollars and fifty-seven cents (\$29,409.57), with interest as aforesaid, within ninety days from the date hereof, the said collateral securities shall be sold at public sale by Jeremiah Leaming, a master in chancery of this court, upon giving thirty days' notice of such sale in the Chicago Legal News for three successive publications, giving the time and place of such sale, and the description of said securities, which place shall be at the judicial salesrooms of the Chicago Real Estate Board, No. 57 Dearborn street, in the city of Chicago, in the said county of Cook, the said master first offering for sale the

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said seven shares of Sonora Land Company, such sale to be to the highest bidder for cash, each party hereto having the privilege of bidding therefor, and without redemption, and upon said sale being made and the confirmation thereof, the said master shall execute proper and sufficient bills of sale and transfers of the same to the purchaser or purchasers thereof, respectively, and said master shall report to the court said sale, and upon the confirmation of such sale, if there shall be any deficiency or difference between the proceeds of said sale and the amount due on said promissory note as fixed by this decree, the said John V. Farwell shall have judgment against the said William Sturges for the amount of such deficiency; and if the amount so found due to the said Farwell for the use, etc., on said \$140,000 promissory note, by this decree, with interest as aforesaid, shall be paid before said sale, together with the master's costs and expenses, if any, the said 6,136 shares of stock shall be delivered to the said Bessie McLeod Sturges, or to her order, or to her solicitor in this case, and the said seven shares of the Sonora Land Company shall be delivered to said William Sturges, or to his order, or to his solicitors; and if there should be a satisfaction of this decree by a sale of said collateral less than the whole, the remainder of such collaterals unsold shall be delivered to the parties to whom they are decreed to belong, as aforesaid.

It is further ordered, adjudged and decreed that said Sturges is not indebted to said John V. Farwell, Charles B. Farwell and Abner Taylor, or either of them, for or on account of the matters in controversy aforesaid (except said sum of \$33,609.57 so found due as aforesaid on said promissory note of \$140,000, and as to the said matters in controversy aforesaid the amount hereinbefore ordered credited to said Sturges on said \$140,000 note, is all the indebtedness of said John V. Farwell, C. B. Farwell and Abner Taylor, or either of them, to him, the said William Sturges.

It is further ordered, adjudged and decreed that neither said William Sturges nor the said Bessie McLeod Sturges have any claim or demand against the said Capitol Free-

hold Land and Investment Company, of London, or the shares of its stock, except as to the said 6,136 shares as aforesaid, owned by the said Bessie McLeod Sturges, and pledged as collateral security to the said John V. Farwell as aforesaid.

It is further ordered, adjudged and decreed that the said John V. Farwell, shall, upon the payment to him of the said sum of \$3,995.62, with interest at five per cent per annum, from the date of this decree, shall quit-claim, with covenants of special warranty against his own acts, all his right, title and interest in and to the said eighty lots in the said Smith Moore's addition to the city of Marquette, which are described as follows, to wit: Lots Nos. 1 to 19, inclusive; lots 30 to 64, inclusive; lot 79; lots 82 to 101, inclusive; lots 130, 131, 132, 134 and 136.

It is further ordered, adjudged and decreed that execution may issue or other process usual to courts of chancery may issue, to enforce this decree upon motion therefor, if the same become necessary, and that each party pay its own costs and charges in this cause."

TENNEY, CHURCH & COFFEEN, attorneys for plaintiff in error; S. P. SHOPE, of counsel.

THOMAS A. MORAN and HENRY S. MUNROE, for Bessie McLeod Sturges and James H. Wilkerson, Adm'r, defendants in error.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

It is apparent, we think, from the decree of Judge Tuley, that there were no other agreements of submission to him than such as are recited in his decree, and we can not, therefore, properly consider the paper that is certified to us and called a supplemental record.

The decree, therefore, with the agreements therein set forth, will be treated by us as constituting the entire record before us.

It is next urged with much persuasiveness that the decree

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must be reversed because the agreements set out therein were not "entered of record," as said in the statute, and that their failure "to be entered of record" goes to the jurisdiction of the judge to hear and determine the matters so attempted to be submitted.

There is not a great deal of room for argument upon that question. It is purely a matter of construction, if, either read alone or in connection with other provisions of the act, it is uncertain whether, used parenthetically, as they are, the words, "to be entered of record," are jurisdictional words, or words merely of direction.

Upon their first reading an impression is created that they are jurisdictional, but upon a more attentive consideration of them in connection with the last clause of section 1 of the act, and considering them, as expressed, in the form of a parenthesis to the substance of the clause in which they occur, it would seem as though the whole purpose of the words was to express to the clerk of the court in which the substantive written agreement was filed, authority or direction to enter that agreement of record.

The last clause referred to of section 1, is, that when the agreement shall be signed by the parties, not when it shall be signed and entered of record, it "shall be of binding force upon the parties thereto in all the courts of this State."

The duty of recording papers filed in court does not attach to the judge, but to the clerk under the direction of the judge or the direction of the law, and the judge, or the court, can not be deprived of jurisdiction by the failure of the clerk to perform his duty.

And such duty failed in or neglected for a time, might be fulfilled by a later compliance. It being, therefore, the duty of the clerk to enter the agreement of record (not a jurisdictional, but a clerical act or duty), we think it was sufficiently complied with when the agreement was spread of record, although for the first and only time, as a part of the decree.

The second paragraph of section 1 of the act in ques-

tion requires that the decree shall contain a statement as to what matters in controversy were submitted, and that such statement thereof shall be conclusive. Such a statement may well consist of a full recital and setting forth in the decree of the agreements, in terms, as was here done.

The jurisdiction, then, of the judge being lawfully acquired as to all matters submitted to him, the more serious question arises as to whether the decree, which gives to Bessie McLeod Sturges the benefit of money found by the decree to be due from the appellant to William Sturges, can be sustained.

The agreement of submission, dated May 23, 1892, as set forth in the decree, is signed by John V. Farwell, Charles B. Farwell, Abner Taylor, The Capitol Freehold Land and Investment Company, of the one part, and by William Sturges, of the other part. Bessie McLeod Sturges did not sign that agreement and is not mentioned in it except to reserve from its operation and effect the matters at issue between herself and John V. Farwell in a certain cause pending in the Federal Court.

The subsequent agreement, dated September, 1893, between Bessie McLeod Sturges and John V. Farwell, concerning the dismissal of her suit then pending in Michigan, and subjecting the matters there in controversy to the adjudication of Judge Tuley along with the matters included in the agreement of May 23, 1892, was signed by Bessie McLeod Sturges, but was not signed by, and did not purport to be made by, or with, the appellant, Charles B. Farwell, and, of itself, was not in pursuance of the form prescribed by the statute.

Nevertheless, and notwithstanding the appellant, Charles B. Farwell, never united with Bessie McLeod Sturges in a submission of matters in controversy, if any there be between him and her, he, together with John V. Farwell and Abner Taylor, was decreed to pay to her the sum of \$75,000 with interest, and it is because thereof that he complains.

Now, if that sum of money had been decreed to be paid to William Sturges, or, in other words, if the decree had confined itself to an adjudication between the parties, by name,

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who signed the submission agreement, we apprehend no fault of lack of jurisdiction would have been urged against the decree.

In considering the question we must determine what the nature of the proceeding was. That matters which, under our system, are cognizable either at law or in equity, as the case may be, were meant by the statute to be susceptible of submission, is, we think, apparent from the language used.

"A judgment (at law), or decree" (in equity), are words that are repeated so often, and in such connection, and always together in the statute, as to repel all presumption of their being naked words of arbitration, and conclusively to demonstrate that the proceeding was intended to be one controlled by either legal or equitable rules and principles as the facts should warrant.

Looking, then, at the decree, it is apparent that the matters involved were peculiarly subjects of equitable determination.

The question then is, whether moneys found to be equitably due from one to another of the parties to the proceeding may be ordered, in a suit in equity, to be paid to one who is not a party to the suit, but who, as between herself and the party to whom the money is found to be due, is equitably entitled to it.

The decree reads:

"That under the circumstances, in equity and good conscience, said (William) Sturges is entitled to receive from said syndicate, for the use of his wife, the said Bessie McLeod Sturges, the value of said one-quarter interest over and above the obligations due from said (William) Sturges to said Farwell. * * * The court further finds that said (William) Sturges' one-quarter interest was then worth, over and above the said debts due from said (William) Sturges to said Farwell, the sum of \$75,000, and that said syndicate should account for and pay the said Bessie McLeod Sturges the said sum of \$75,000. * * * It is therefore adjudged and decreed that the said John V. Farwell, Charles B. Farwell and Abner Taylor pay to the said Bessie McLeod

Sturges, within ninety days from the entry of this decree, the sum of \$75,000, with interest," etc.

What the "circumstances" were which furnished the basis for the finding by Judge Tuley that "in equity and good conscience" William Sturges was entitled to receive anything for the use of Bessie McLeod Sturges, is not shown, and under the statute would not be a matter for review, if shown.

We are concerned only with whether, upon such a finding, Judge Tuley had the power to order the money paid to Mrs. Sturges.

It is not uncommon in equity to order money that is found to be due from one party to another to be paid to a third person who is not a party to the suit.

Take for instance the cases of receivers, sheriffs, intervening petitioners and beneficial usees generally.

The rules of practice in equity in the Circuit Courts of the United States provide that "Every person not being a party in any cause who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in any cause against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause." 2 Beach on Modern Eq. Pr., 1075, rule 10.

We cite this rule not as authority but to show the practice.

In *Grant v. Baronis*, 97 Cal. 496, it is said:

"In an action for specific performance of an agreement to convey land, a court of equity has power, by its decree, as against the parties who are before it, to enforce all the terms of the agreement. If the vendor's agreement is that his conveyance shall transfer the title free of incumbrances, the court can direct the application of the purchase money to the satisfaction of those incumbrances, and for that purpose can cause the money to be brought into court

Farwell v. Sturges.

and disbursed under its direction. If the holders of those incumbrances are before the court, they will be bound by the direction of the court, and their claims would be satisfied by a satisfaction of the judgment.

"If the amount of the incumbrances is ascertained, and the court finds that the liens therefor can be discharged by mere payment thereof, it can direct that the payment be made directly to the holders of the incumbrances even though they be not before the court, instead of to the vendor. So long as the vendor incurs no liability, and is freed from any personal claim for the amount of the incumbrances, he will not be heard to object to the application of the purchase money for the purpose of making good his agreement with the vendee."

The same principles are frequently alluded to in cases where the question has arisen of who may avail themselves of error in a decree that directs money or property to be paid or delivered to persons who are neither parties nor privies. *Freeman on Judgments* (2d Ed.), Sec. 174; *Ransom v. Henderson*, 114 Ill. 528; *Farnam v. Borders*, 119 Ill. 226; *Phenix Mut. L. Ins. Co. v. Batchen*, 6 Ill. App. 621.

As between the appellant and William Sturges, the objection to this decree would have no standing. It would be final and binding upon both parties. It would measure the extent of appellant's obligation to William Sturges, and its payment would effectually and forever discharge appellant. Although the decree wherein it directs the money to be paid to Mrs. Sturges would have been more professionally artistic in form if it had followed the finding and made the money payable to William Sturges for her use, that inadvertence or omission is one that reaches the form alone.

In substance that is what it is. The whole decree makes it plain. No possible injury from such an omission in form can ensue to the appellant.

The decree binds William Sturges as a party to the submission; it binds Bessie McLeod Sturges if she accepts it, and it protects the appellant against them both from any further claim against him; and if, as has been suggested, the

appellant has claims against her personally, it would seem such might yet be set off against this decree.

The great importance of the questions presented by this record, and because they are new, is a sufficient excuse for embodying the whole record along with our imperfect reasons.

The decree of Judge Tuley is affirmed.

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64 302

Edwin J. Bowes, Jr., and John R. Bowes, as Edwin J. Bowes, Jr., & Bros. v. Industrial Bank of Chicago.

1. **BILLS OF EXCHANGE**—*Form of, by Indorsement.*—The indorsement—

“PEABODY, HOUGHTELING & CO.,

Pay to the order of Empire Building Co.,

JOHN R. BOWES,”

on the following instrument:

“\$500

No. 4,794.

CHICAGO, June 17th, 1892.

To E. J. BOWES, JR., & BROS.:

This is to certify that the Empire Building Co., contractor for the entire work of your building No. — Fulton street, is entitled to a payment of five hundred dollars by the terms of the contract.

Contract..... \$7,850

Extra work.....

Remarks.

Deductions.....

Total

Previous issues, \$6,825.....

Present issue.....\$500 6,925

Balance

\$925

WILSON & MARBLE

By A. H. DODD.”

is held to be a bill of exchange on Peabody, Houghteling & Co., payable at sight, the sum being adopted from the face of the instrument.

2. **SAME**—*Renewed by Indorsement.*—Any indorsement of a bill of exchange may be considered as a new bill drawn by the indorser on the acceptor in favor of the payee.

3. **SAME**—*Presenting for Payment, to Charge Drawer.*—To charge a person as drawer of a bill of exchange, the bill must be presented for payment, and notice of non-payment given according to the law merchant.

Bowes v. Industrial Bank of Chicago.

Assumpsit, on a bill of exchange. Appeal from a judgment of the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Submitted at the October term, 1894. Affirmed. Opinion filed January 10, 1895. Rehearing granted and reversed and remanded. Opinion on rehearing filed April 4, 1895.

WOOLFOLK & BROWNING, attorneys for appellants.

APPELLEE'S BRIEF, JONES & STRONG, ATTORNEYS.

Appellee contended that the instrument sued is negotiable.

Negotiable instruments are instruments on which a right of action passes by an assignment by mere indorsement. Usually the test of the negotiability of an instrument is found in the use of the words "order" or "bearer." It may be stated as a rule of law that these words or their equivalent are essential to invest the instrument with the attribute of negotiability. 16 Am. & Eng. Enc., 479; Fawcett v. Nat. L. Ins. Co., 97 Ill. 11; Lowry v. Andreas, 20 Ill. App. 521.

Our statutes provide: "All instruments in writing made by any person, whereby such person acknowledges any sum of money to be due any other person, shall be taken to be due and payable, and the sum of money therein mentioned shall by virtue thereof be due and payable as therein expressed." Ill. Rev. Stat., Chap. 98, Sec. 3.

The statutes also provide, Sec. 4, Chap. 98: "Any instrument in writing made payable to any person named as payee therein shall be assignable, by indorsement thereon under the hand of such person and of his assignees, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in each and every assignee successively."

"A bill of exchange is an unconditional order in writing for the payment of a sum of money absolutely and at all events." Daniel on Negotiable Instruments, Sec. 27 (4th Ed.); Benjamin's Chalmers, Bills, Notes and Checks, Art. 1.

No particular form is necessary to its validity. Dan'l Neg. Inst., Secs. 35, 106; 2 Am. and Eng. Ency. 321; Weston

v. Myers, 33 Ill. 424; Hibbard v. Holloway, 13 Ill. App. 101; Swift v. Whitney, 20 Ill. 144.

Sufficiency of fund is immaterial. Benj. Chal. Bills, etc., Art. 10, Explan. 2.

If the sum payable can be gathered from any part of the instrument, whether from the figures or the form of expression in the body of the bill, it is valid. Benj. Chal. Bills, etc., Art. 12, Explan. 2; Murrill v. Hundy, 17 Mo. 406.

The contract between the original parties to the paper is to be gathered from all that appears in it. Prins v. So. Branch Lumber Co., 20 Ill. App. 236; Riley v. Dickens, 19 Ill. 29; Corgan v. Frew, 39 Ill. 31.

It is usual, but not necessary to insert date. Dan'l Neg. Inst., Secs. 121, 83; 3 Am. and Eng. Ency. 320; Benj. Chal. Bills, etc., Art. 15.

It is usual, but not necessary, to state the place where drawn. Childs v. Laffin, 55 Ill. 156; Benj. Chal. Bills, etc., Art. 2.

Payable on demand is understood when no time of payment is expressed. Dan'l Neg. Inst., Sec. 88; Benj. Chal. Bills, etc., 18 Explan. 1.

A delivery of an incomplete bill, signed or indorsed for use as such, confers a *prima facie* authority upon any successive holder to fill the blanks necessary to its completion; and if the bill be negotiated to a holder for value without notice, the presumption of authority becomes absolute. Benj. Chal. Bills, etc., Art. 23; Dan'l Neg. Inst., Sec. 38 and 142; Eliot v. Lovings, 54 Ill. 213; Maxwell v. Vansant, 46 Ill. 58; Boynton v. Pierce, 79 Ill. 145.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

At the foundation of this suit is an instrument as follows:

"\$500.

No. 4,794.

CHICAGO, June 17th, 1892.

To E. J. BOWES, JR., & BROS.:

This is to certify that Empire Building Co., contractor for the entire work of your building, No. — Fulton street, is entitled to a payment of five hundred dollars.

Bowes v. Industrial Bank of Chicago.

Contract.	\$7,850, by the terms of the contract.	Remarks.
Extra work.		
Deductions.		
Total.		
Previous issues,	\$6,325.	
Present issue,	500 \$6,925.	

Balance, \$925.

WILSON & MARBLE,

(Indorsed) By A. H. Dood.

Peabody, Houghteling & Co.,

Pay to the order of Empire Building Co.

JOHN R. BOWES.

Pay to the order of Industrial Bank,

EMPIRE BUILDING CO.

G. C. McARTHUR, Treas."

It is assumed that the signature to the first indorsement is to be regarded as that of the appellants. There is no evidence that the instrument was presented to Peabody, Houghteling & Co. for payment before July 17, 1892, nor that any notice of presentment for payment, and the fact of non-payment, was given to the appellants before August 3, 1892.

The appellants offered to prove that they had overpaid the Empire Building Co., which evidence the court rejected, and the appellants excepted.

For the appellee the court gave, over exception by appellants, these instructions:

"The jury are instructed on the plaintiff's behalf that if they believe from the evidence that the plaintiff obtained the instrument sued upon for a valuable consideration, without notice of mistake or fraud, they will find for the plaintiff and assess its damages at \$500, and interest thereon at five per cent from June 17, 1892.

If jury believe from evidence that plaintiff obtained instrument sued on for value after the Empire Building Company, or some one of them, had presented the same to Peabody, Houghteling & Co. for payment on or about its date,

that is sufficient presentment, and you shall find for the plaintiff.

If jury believe from the evidence that plaintiff obtained certificate for valuable consideration, in ordinary course of business, and discounted the same, they must find for plaintiff."

And refused those asked by the appellants as follows:

"1. If jury believe from evidence that plaintiff is holder of certificate for value, and that the same was not presented for payment until the Empire Company had been paid in full, they must find for the defendants.

2. If jury believe from the evidence that the plaintiff is the holder of the certificate for value, nevertheless the plaintiff was required to use due diligence in demanding payment, and if jury believe from evidence that plaintiff did not demand payment until after the Empire Building Company had been paid in full, must find for the defendant.

3. If jury believe from evidence that plaintiff holds certificate in good faith and for value, nevertheless the plaintiff was required to use due diligence in collecting amount called for, and if they believe from evidence that by mistake certificates for too much money were issued by architect and that plaintiff did not demand payment until after contractors had been paid in full, and the loan in Peabody, Houghteling & Co.'s hands was exhausted on certificates previously presented, they must find for defendants."

To which refusal appellants excepted.

That the indorsement signed John R. Bowes, in fact for or as the act of the appellants, was a bill of exchange on Peabody, Houghteling & Co., payable at sight, the sum being adopted from the face of the instrument, is a position which is in accord with such authority as there is applicable to the subject. Story on Bills, Sec. 33; Leonard v. Mason, 1 Wend. 522.

"Every indorsement of a bill may be considered as a new bill, drawn by the indorser on the acceptor in favor of the payee." (Payee under the indorsement must be understood.) Van Staphorst v. Pearce, 4 Mass. 258; same point in Heylyn v. Adamson, 2 Burr. 669.

Bowes v. Industrial Bank of Chicago.

Now the reason of that doctrine is, not that the face of the paper is a bill of exchange, but that the indorsement is a direction, or an order, to the drawee to pay the amount—the sum of money—expressed in the bill, to the person, or his order, who may be named in the indorsement. The same reason applies if that direction or order applies to the sum expressed on the other side of any paper; provided it is clear that sum is adopted in the direction or order.

And it is only because the indorsement by the appellants is a bill of exchange that the second indorser of the paper can sue the first indorser.

If it were not a bill of exchange the law merchant would not apply to it, and being not a promise or agreement to pay, or an acknowledgment of indebtedness, the statute does not. *Peoria & O. R. R. v. Neill*, 16 Ill. 269; *Clifford v. Keating*, 2 Scam. 250.

And to charge the appellants as drawers, the bill must have been presented for payment, and notice of non-payment given according to the law merchant, which we need not repeat. *Montelius v. Charles*, 76 Ill. 303.

But holding as we do that the instrument is a bill of exchange, the point that the appellants are discharged was not made below, where perhaps it might have been answered by evidence; nor is the point made in this court. *People v. Hanson*, 150 Ill. 122.

The judgment is affirmed.

MR. JUSTICE GARY ON REHEARING.

We did not treat the appellants fairly in the original opinion. The instructions refused, there copied, do raise questions on diligence and delay; but as it was clear that the discovery that the indorsement by the appellants was a bill of exchange was our own, we held that the point of discharge of the drawer of such a bill, by negligence of the holder, was not made on the trial, where nobody thought of a bill of exchange.

This is equivalent to holding that if a party takes a right position, but does not sustain it by assigning the right reason

for his position, then his position is bad, which holding allows no margin for the superior wisdom of the court to work upon.

That our form of argument was not in the brief of the appellants is unimportant. *Yager v. Palmer*, 86 Ill. 597, 601.

This point is omitted in the syllabus of that case.

We ought at first to have reversed the judgment and remanded the cause, and therefore do it now.

Reversed and remanded.

SHEPARD J., dissents.

Orland D. Orvis v. Sophia Z. Waite.

1. *CONTRACTS—Purchase of Stock—Option to Return—Offer to Return.*—Where a person buys stock in an incorporated company, with an option to return the same to the vendor within a stated time, and be paid a fixed sum therefor, an actual return or offer to return the stock is necessary before suing on the contract. Leaving the same at a bank and notifying the vendor is not sufficient.

Assumpsit, on the contract stated in the opinion of the court. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Submitted at the March term, 1895, of this court and affirmed. Opinion filed May 16, 1895.

DOW, WALKER & WALKER, attorneys for appellant.

GEORGE B. POWER, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This suit is by the appellee against the appellant to recover upon a writing as follows :

“CHICAGO, Sept. 25, 1863.

Whereas, Sophia Z. Waite has this day purchased twenty-five (25) shares of stock in the company known and called

Orvis v. Waite.

the 'Orvis Brothers' Down Draft Furnace Company,' and twenty-five (25) shares of stock in the company known and called the 'Orvis Steel Arch Furnace Company,' which stock is represented by certificates issued to Sophia Z. Waite numbered '69' and '37,' respectively, and dated September 25, 1893. Now, in consideration of one thousand (1,000) dollars paid for said above named certificates, I, Orland D. Orvis, do hereby covenant and agree and by this instrument do bind myself, my heirs and assigns, to pay to Sophia Z. Waite one thousand (1,000) dollars and interest thereon at six per cent per annum, in one year from this date, provided said Sophia Z. Waite shall elect to return to me said stock certificates for fifty shares, at any time previous to September 25, 1894.

ORLAND D. ORVIS."

Before the year was out the appellee caused the stock certificates to be left at the First National Bank of Chicago, and notices—the contents of which are not shown by the record—were sent by the bank to the appellant.

October 4, 1894, the appellant wrote to the husband of the appellee that "I have failed to be prepared to meet my obligation to Mrs. Waite at maturity, but for good and sufficient reasons which you are already familiar with, I have thus far been unable to do so."

And, October 11, 1894, that he expected soon to make some arrangement "which will enable me to settle my obligations to Mrs. Waite." These letters are acknowledgments by the appellant—when read in connection with the circumstances—of his obligation to pay her for the stock, but they are no more. No facts are stated in them, nor did the appellee act upon them so as in any way to change her position in consequence of them. It is safe to say that if, without the letters, the appellee had no cause of action, the letters did not give her any.

The privilege or option to her by the words "provided said Sophia Z. Waite shall elect to return to me said stock certificates," was not secured by any merely mental election on her part.

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An actual return or offer to return the certificates was necessary. Com. Dig. C. 58; C., M. & St. P. Ry. v. Hoyt, 37 Ill. App. 64.

And if the notices from the bank were for the appellant to come for the certificates—which is probable—such notices were not enough. Wright v. Gardner, 66 Ill. 94; Sanborn v. Benedict, 78 Ill. 309.

Her declaration alleged that September 25, 1894, she tendered the “fifty shares of stock and demanded the said \$1,000, but that appellant refused to accept and pay;” of which allegation there was no proof, not even any attempt to prove it. The peremptory instruction to find a verdict for the appellee was erroneous.

This is not the first case before us in which an unanswerable defense is not alluded to. Smith v. Campion, 46 Ill. App. 501; Oliver v. Gerstle, No. 5608, this term.

The judgment is reversed and the cause remanded.

**Corn Exchange Bank of Chicago, Charles B. Foote and
Lewis E. Gary v. William F. Rockwell et al.**

1. *CREDITORS—Foreign and Domestic—Preferences.*—The State owes a duty to its citizens to protect them against the removal from its jurisdiction of the property of insolvent foreign corporations, by foreign receivers thereof, until the just claims of its own citizens have been satisfied.

2. *SAME—Foreign Creditor Obtaining Judgment in Illinois.*—Where a foreign creditor brings suit and obtains a judgment in the courts of this State, files his bill and procures the appointment of a receiver, the courts of this State will afford him the same remedies as to a resident creditor.

3. *RECEIVERS—Foreign and Domestic.*—There is no difference in principle between a case where a foreign receiver claims against a domestic creditor, and one where the receiver is appointed in this State ancillary to or in aid of a foreign receivership.

Creditor's Bill.—Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1895. Reversed with directions. Opinion filed May 16, 1895.

STATEMENT OF THE CASE.

The F. J. Kaldenberg Company was a New York corporation, with its principal office and place of business in New York City, and having a branch store and business in the city of Chicago.

Frederick J. Kaldenberg was its president.

On April 18, 1893, said Frederick J. Kaldenberg filed his bill against said corporation, in the Superior Court of Cook County, setting forth the nature of the business of said corporation, and the places, including Chicago, where it was carried on, and that its stock of goods in Chicago was of the value of \$15,000; that the corporation had failed, and was insolvent and unable to pay its debts, of which several thousand dollars were owing in Chicago; that suits had been begun against it, and in order to protect its property for the benefit of its creditors and stockholders, the complainant, with three other persons, constituting a majority of its trustees, instituted proceedings in the Supreme Court of New York for the appointment of a receiver, the distribution of its property and assets among its creditors and stockholders, and for its dissolution and the winding up of its affairs; that on April 7, 1893, a receiver of the property of said corporation was appointed by said New York court, who qualified and at once took possession of the property and assets of the corporation in New York and wherever the same could be reached by him, and that he, by an agent duly authorized by him, took actual possession of the store, property and effects in Chicago; that on April 14, 1893, while said receiver was so in possession by his agent, of the Chicago property, the appellant bank sued out a writ of attachment upon an indebtedness of \$1,000, and the sheriff of Cook county, under the attachment writ issued in said suit, immediately took possession of said store and property in Chicago, and holds the same, and excludes therefrom the agent of said receiver; that other creditors have threatened to bring attachment suits and levy upon the same property, etc.; and prayed for the appointment of a receiver, "and that such receiver, when appointed, shall be authorized, at

the proper time, to account to and act in conjunction with the receiver heretofore appointed by the Supreme Court of New York, to the end that the affairs of said corporation may be finally and properly wound up by that court."

The corporation alone was made a party defendant, and, on the same day the bill was filed, it entered its appearance and consented to the appointment of a receiver, which was at once done and the receiver at once qualified.

By the order of appointment, the receiver was appointed "for all of the property and effects of the said defendant company situated and being within the State of Illinois;" and it was therein further ordered that the sheriff of Cook county, with the consent of the attaching creditor, should turn over to the receiver so appointed all the property seized by him, on April 14, 1893, "upon the condition that all property so turned over or the proceeds thereof, shall be in the receiver's hands in all respects, and as fully, and to the same extent subject to the lien and hold of the attachment begun by Foote in the Circuit Court, as if said property had not been turned over, the intent hereof being that said attachment and the lien and hold thereof shall follow said property into said receiver's hands."

On the same day the order was entered, consent was given by the attaching creditor, and the attached property was turned over by the sheriff to the receiver.

It seems that the attachment suit mentioned in the order as having been begun by Foote (one of the appellants), was the same suit mentioned in the bill as having been begun by the appellant bank, the bank being the real owner of the claim upon which the suit was based.

The banking business of the corporation, in Chicago, had been done with the appellant bank, and said attachment suit was upon a check for \$1,000, which had been deposited with the bank in the usual course of business, and payment refused.

The appellant bank also held, at the same time, four notes aggregating \$8,000, made by the said Kaldenberg corporation, payable to the order of the bank for loans or

renewals of loans, all of which notes matured in April and May, 1893.

On June 17, 1893, an attachment suit against the corporation was begun on said four notes, in the name of the appellant, Lewis E. Gary, to whom the bank had assigned the notes without consideration, for that purpose, and on the same day the writ was delivered to the sheriff, who made return thereon, omitting signature, as follows:

"No property of the within named defendants found in my county subject to levy this 19th day of June, 1893. All of the property that was attached by me on former attachment writ was delivered to the Chicago Title and Trust Company, receiver, on or about the 14th day of June, 1893. The within named defendants not found in my county."

It is conceded that it was an error of the sheriff to state the 14th day of June as the date when the property was turned over, and that it should have been stated as the 14th day of April.

Both attachment suits were in the Circuit Court; service in each case was had by publication; the two causes were consolidated and judgment by default against the corporation was entered July 14, 1893, in the Foote suit for \$1,014, and in the Gary suit \$8,103 and costs in each, and reciting *inter alia* in the judgment as abstracted as follows:

"That after the levy of the Foote writ the Superior Court appointed a receiver, as hereinabove stated, and did at the same time enter the order upon the sheriff hereinabove stated, to turn over the attached property, and that the sheriff did so do; finding that said two attachments were the only ones against said defendant in that court, and that the judgments therein, being rendered together at the same term were, by the attachment act, placed on the same footing as to satisfaction out of proceeds of property attached; and ordering that the plaintiffs be given, and thereby giving them permission and authority, by such proceedings in the Superior Court as they might think proper, to obtain satisfaction of said judgments out of the property turned over by the sheriff to the receiver, or its proceeds;

and that said plaintiffs share *pro rata* in any moneys realized by such proceedings."

A petition by appellants Foote and Gary, subsequently amended by joining the appellant bank therein, was filed in this cause, setting up the last recited judgments and the previous proceedings in the attachment suits and in this cause, and showing that the debts upon which said attachments and judgments were based, were contracted at Chicago in the course of the banking business done by the corporation with the bank, in reliance by the bank upon the corporation's assets in its branch business at Chicago, and setting up that the bank is an Illinois corporation doing business in Chicago; that in equity the debts have always belonged to the bank, and that appellants are the only local creditors of the corporation, and claiming that the receivership here is of no validity against appellants' rights as Illinois creditors, and is a mere device to protect the New York receiver and the corporation against creditors in this State, and claiming all of the fund realized from the sale of the assets in Illinois, or so much thereof as may be necessary to satisfy said judgments.

The petition of the appellants was answered by the receiver, and most, if not all, of the foreign creditors who had proved claims against the estate in the hands of the receiver, and upon a final hearing and decree, claims by creditors of the corporation, not residents of Illinois, and mostly of New York, exceeding \$125,000, were allowed and ordered to prorate in the balance in the hands of the receiver, along with the appellant on its judgment in Gary's name for \$8,103, and one other claim of an Illinois creditor amounting to \$12. The appellant Foote was, by the decree, given priority over the other creditors to the extent of the judgment in his name belonging to the bank, amounting with costs to \$1,045.15.

By the receiver's report he held \$8,021.79, less receiver's and attorney's compensation, as the net proceeds arising from a sale of all the property in Illinois for distribution.

This appeal is from that decree.

Corn Exchange Bank of Chicago v. Rockwell.

DUPEE, JUDAH & WILLARD, attorneys for appellants.

APPELLEES' BRIEF, JOHN W. BURDETTE, CRATTY BROS., MAC-
LAREN, JARVIS & CLEVELAND, ATTORNEYS.

Parties interested or having rights in a fund or property in the custody of a court of equity for administration must seek their remedy in that forum. Creditors can not, after equity acquires jurisdiction of the fund for administration by any proceeding at law, acquire preferences. *Russell v. The Chicago Trust & Savings Bank*, 139 Ill. 538; *Roseboom et al. v. Whittaker et al.*, 132 Ill. 81; *Plume & Atwood Mfg. Co. v. Caldwell*, 136 Ill. 163; *Am. & Eng. Enc. of Law*, Vol. 20, page 138.

The courts of this State are open alike to resident and non-resident creditors. The law treats all creditors alike who invoke the action of our courts irrespective of residence. *Rhawn v. Pearce*, 110 Ill. 350, and cases cited; *Holbrook v. Ford*, 39 N. E. Rep. 1091; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

We have heretofore held that the State owes a duty to its citizens to protect them against the removal from our jurisdiction of the property here located of insolvent foreign corporations, by foreign receivers thereof, until the just claims of its own citizens have been satisfied. *Hunt v. Gilbert*, 54 Ill. App. 491.

It was said in *Heyer v. Alexander*, 108 Ill. 385 :

"It is not just or fair that creditors in this State should be compelled to go to a foreign State to receive a *pro rata* share of the debtor's property, when they, perhaps, extended credit upon the faith of the debtor's property in this State and to which they looked for payment." See, also, *Holbrook v. Ford*, 153 Ill. 633.

We discern no difference in principle between a case where a foreign receiver claims against a domestic creditor, and one where the receiver is appointed in this State ancillary to or in aid of the foreign receivership.

The case of *Holbrook v. Ford*, *supra*, certainly does not lay down any such distinction. There, it is true, the judgment creditor and complainant in the creditor's bill under which the receiver was appointed, was "a resident of New York, but he brought suit and obtained judgment in Illinois, and filed his bill and procured the appointment of a receiver here." (See opinion of the court.) And in such a case our courts are open to afford the same remedies to non-resident as to resident creditors.

In this case there was a New York corporation with its principal office and business in New York, a branch office and business and assets and creditors here, a receivership in New York, of that corporation, obtained upon the application there of the president of the corporation, who was also the complainant in the bill for a receiver here, and three of his associate managers of the corporation; a taking possession here by the foreign receiver of all the property in Illinois belonging to the corporation, a dispossession of such receiver by the sheriff of this county under an attachment by a creditor citizen of this State, a bill filed here by the same president of the corporation, not upon a judgment obtained here, nor upon any allegation even of being a creditor of the corporation, but solely upon allegations of the insolvency of the corporation, the appointment of a receiver in New York, the taking possession of the property here by such receiver, his dispossession by the sheriff by an attaching creditor here, the threats of other suits by other creditors here, and the disability of protecting creditors generally and stockholders, and praying that such receiver when appointed shall account to and act in conjunction with the New York receiver to the end that the corporation's affairs may be finally wound up and settled by the New York court.

The receiver appointed here, upon the bill so filed here, was limited by the order of appointment to assets in Illinois, and, as shown by the report of the receiver, such assets consisted of over \$22,000 in property seized by a domestic attaching creditor and turned over by the sheriff, besides accounts receivable from which were realized over \$1,000.

After realizing upon all assets here and paying expenses allowed by the court, the receiver here will have but about \$7,000 to distribute. A little over \$1,000 of that balance will go to the domestic creditor who attached in the interest of the appellant bank before the receiver was appointed here, and the balance will be distributed, according to the decree, among New York creditors whose claims for over \$125,000 have been proved up here, and the two other domestic creditors, one for \$1,200, and the other, the attaching creditor, Gary, for the use of the appellant bank for \$8,103, whose claims were proved up.

That such a receivership as that under the bill in this case was merely ancillary or auxiliary to the New York receivership, is what was said in *Nolbrook v. Ford*, *supra*. And that it was a mere device to attain indirectly what could not be attained directly, by swallowing up the assets here which had furnished the reliance upon which the corporation had obtained credit here, in favor of the New York receiver, seems very plain from the mere statement of facts.

We do not think it can be done successfully. The decree was erroneous in requiring the appellants, Gary and the bank, to prorate with the foreign creditors. What is left is insufficient to pay their claims in full, and it should have been given to them. It is not necessary to discuss any of the other questions argued, except to say that it is immaterial whether the Gary judgment was regularly rendered or not. It is not disputed but the correct amount was included in the judgment, and it was properly allowable as a claim against the estate in the hands of the receiver, whether reduced to judgment or not. The court had jurisdiction under the bill that was filed to adjudicate claims and distribute assets.

The decree of the Superior Court will therefore be reversed with directions to order the receiver, after satisfying the Foote judgment, to distribute the assets remaining in its hands *pro rata* among the domestic creditors whose claims were allowed, in preference to the foreign creditors.

If anything remains over, which we suppose will not be

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the case, then to distribute such residue *pro rata* among the foreign creditors, or direct it to be accounted for to the New York receiver as may seem proper. Reversed with directions.

OPINION BY MR. PRESIDING JUSTICE WATERMAN.

We are presented in this case, not with an application by a foreign receiver to take assets of an insolvent out of this State, but with the simple question of whether citizens of the State of New York, when they come into the courts of this State and appeal to them for relief, are entitled to all the remedies and rights of citizens of this State, or whether our courts will discriminate against foreign creditors in favor of citizens of this State.

Time was when a "stranger in a strange land," the foreigner, the alien, was looked upon as a dangerous creature, to be watched and plundered. At the common law an alien could not acquire title to real estate by descent or by mere operation of law; an alien had no inheritable blood through which title could be deduced. By the statutes of Henry the Eighth, alien artificers were prohibited from working for themselves in the kingdom of England, and all leases of houses and shops to them in England were declared void. They were allowed to trade, but at the custom house had to pay higher duties than other people. In these "good old times" the courts discriminated against the foreign creditor.

It was then believed that wealth could be acquired by prohibiting the export of gold and silver, and that food could be made abundant and cheap by limiting the price at which grain should be sold.

In more enlightened days in civilized countries, most if not all of these laws, the product of ignorance and barbarism, have been swept away, and the foreigner—the alien—is a being no longer either feared or discriminated against.

The Supreme Court of this State, in *Rhawn v. Pierce et al.*, 110 Ill. 350, speaking of the case of *Hibernian National Bank v. Lacomber et al.*, 84 N. Y. 367, said that in that case "the attaching creditors, regardless of their residence,

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had the right to enforce the collection of a debt in the State of New York upon an equal footing with persons resident in the State of New York." We regard this as the correct doctrine.

Under our laws, the courts of this State are open alike to the citizens of every State for the enforcement of legal rights, and when a non-resident invokes the aid of our courts to enforce a legal right, interstate comity does not demand that our courts should give the laws of another State extra-territorial effect here, and adopt their laws in the administration of justice.

And in *Holbrook v. Ford*, 39 N. E. 1091, the court said: "But non-resident creditors have the same right to pursue the remedies prescribed by our laws for the collection of debts as resident creditors. Once properly in court and accepted as a suitor, neither the law, nor court administering the law, will admit any distinction between the citizen of its own State and another." See, also, *Chaffee v. Fourth National Bank*, 71 Me. 514; *Sturtevant v. Armsby Co.*, New Hampshire, 1891; *Reynolds v. Alden*, 136 U. S. 350; *Wilcox v. Silver Plate Co.*, 123 Ind. 477; *Sheldon v. Blauvelt*, 29 S. C. 453; *Stricker v. Tingham*, 35 Ga. 176.

If the Superior Court has any doubt—it would seem there can be none—that the Illinois creditors will be permitted to have and share in the proceeding in New York equally, *pro rata*, with New York creditors, it might retain the fund until such question is determined; but otherwise all creditors, foreign and domestic, should share *pro rata* in the fund to be distributed here.

F. Kirchman and J. Baumruk v. West & South Towns Street Railway Co., Chicago General Street Railway Co., City of Chicago and J. V. MacAdam.

Joseph Shima v. Same.

1. PLEADINGS—*Validity of Ordinances.*—Allegations concerning fundamental facts upon which the validity of an ordinance depends must be more precise and certain than to show, upon mere information

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and belief, what may, under such an allegation, have its existence only: and the rule that all allegations will be most strongly construed against the pleader, has especial application when the validity of the act of a public corporation like a city, is involved.

2. CITIES AND VILLAGES—*Determining the Sufficiency of Petitions for Public Improvements.*—In determining the sufficiency of a petition for a public improvement, a city council acts in a quasi judicial character, and its judgment upon the sufficiency of the petition, in the absence of allegations of fraud, will not be inquired into by the courts upon the application of a private person.

3. DAMAGES—*Public Improvements—Remedy at Law.*—If a person is damaged by a public improvement his remedy is at law and not in equity.

Bill to Enjoin the Building of a Street Railway.—Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

J. G. KRAL and CONDEE & ROSE, for appellants Kirchman and Baumruk; CHARLES B. PAVLICEK and COHRS & GREEN, for appellant Shima.

PECK, MILLER & STARR, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The bills that were filed in these two causes in the Circuit Court, present substantially the same questions upon the appeals from the orders there entered sustaining general demurrers and dismissing the bills for want of equity, and for convenience' sake we will consider both cases together, as appears to have been done below.

Both bills attack the same ordinance of the city of Chicago upon substantially the same grounds, and seek relief by way of injunction against the appellees, from constructing their railways in and along certain specified streets, under the authority of said ordinance. The ordinance, the validity of which is attacked, was passed by the city council on April 5, 1893, and the complainants in both bills were separate owners of certain separate lots abutting respectively upon certain of the streets therein named.

The two principal objections to the validity of the ordi-

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nance are, that the ordinance is void, first, because passed without the necessary petition by the owners of the land fronting on the streets in question, as required by paragraph 90, Sec. 1, Art. V, Chap. 24, Rev. Stat. Ill., entitled Cities, Villages and Towns; and second, because passed without the necessary notice having been first given of the time and place of presenting the petition to the council, as required by Sec. 3, Chap. 66, Revised Stat. Ill., entitled Horse and Dummy Railroads.

The ordinance was set forth and made a part of each of the bills, and on its face conferred the authority upon the appellees to do the acts complained of.

The powers of the city council in cities organized under the act entitled Cities, Villages and Towns, as finally amended March 30, 1887, are, so far as the questions here involved are concerned, contained in paragraphs 9, 24 and 90, of Sec. 1, Art. V, Chap. 24, Rev. Stat., above referred to. It has been held that the provisions of paragraph 90 constitute a limitation upon the powers granted by paragraphs 9 and 24. *Hunt v. C. H. & D. Ry. Co.*, 121 Ill. 638; *Tibbitts v. Street Ry. Co.*, 153 Ill. 147; same case, 54 Ill. App. 180.

And it was held in *Metropolitan City Ry. Co. v. Chicago*, 96 Ill. 620, which was the case of a municipality, as trustee for the public, asking substantially the same relief which is sought by these complainants in their capacity of private persons, that the notice required by Sec. 3, Chap. 66, Rev. Stat., aforesaid, to be published, was essential to the validity of an ordinance of this kind.

The allegations concerning the lack of publication of notice of the time and place of presenting the petition for the passage of said ordinance are made upon "information and belief" only; it is not even averred that the complainants are informed and believe, and upon such information and belief, state and charge the fact to be, that no notice was given.

Allegations concerning fundamental facts upon which the validity of municipal ordinances depend, must be more precise and certain than to show upon mere information and belief what may, under such an allegation, have its exist-

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ence in bare rumor only, and the rule that all allegations will be most strongly construed against the pleader has especial application where the validity of the act of a public corporation, like a city, is involved.

It is made to appear by the allegations of both bills concerning the lack of necessary petitions by the owners of land fronting upon the streets in question, that petitions by such owners for the passage of the ordinance were presented to the city council, but it is alleged that such petitions were insufficient in not including a majority in measurement of frontage owners, and for other less material reasons.

It is not alleged that any fraud was practiced upon either the council or the property owners in the matter of the petitions that were presented. All that is, in effect, alleged is that the petitions were insufficient on account of the deficiencies stated.

Now, we have held that in determining the sufficiency of such petitions the city council acts in a quasi judicial character. *Tibbitts v. Street Ry. Co.*, 54 Ill. App. 180; *North Chicago Street Ry. Co. v. Cheetham* (No. 5516 this term). And that being the rule, its judgment upon the fact of the sufficiency of the petition before it, in the absence of allegations of fraud, will not be inquired into by the courts upon the application of a private person, who, if he be damaged, has a clear remedy at law for all the injury he may sustain through the imposition upon the surface of the street of an additional use by the public.

The reasons for not interfering in such cases are, for the purpose of this opinion, sufficiently stated in the *Tibbitts* case, *supra*, and need not be repeated. We refer also to *Stewart v. Chicago General Street Ry. Co.* (No. 5561) filed this term.

It is unnecessary to comment upon the other points argued, for they all depend in substance upon those that we have noticed, except that of laches in filing the bills, and upon that we refer, also, to the *Tibbitts* case, *supra*, wherein the delay was even less than in these cases.

The decree of the Circuit Court in each of the causes is affirmed.

**Consumers' Pure Ice Company v. Robert E. Jenkins,
Assignee of the Consolidated Ice Machine Company.**

1. **DAMAGES—Prospective Profits.**—Calculations as to prospective profits in other enterprises in which a party plaintiff would have engaged had his contract with the defendant been fulfilled, are too remote to form the basis of damages occasioned by the breach of the contract.

2. **SAME—Failure to Supply a Machine.**—The damage for a failure to supply a machine is the value of the use of it.

3. **PROSPECTIVE PROFITS—Not Recoverable as Damages.**—When a party, being about to embark in a new business, is wrongfully prevented by another, he can not recover expected profits because there can be nothing to show that such profits would have been made.

4. **INTEREST—On Instruments in Writing.**—It is proper to allow interest upon a balance due upon a written contract for the furnishing of an ice machine; such a contract is an instrument in writing within the meaning of the statute.

Assumpsit.—Breach of contract. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

**APPELLANT'S BRIEF, BARNUM, HUMPHREY & BARNUM,
ATTORNEYS.**

A party injured is entitled to recover all his damages, including the gains prevented as well as losses sustained, and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation, and they must be certain both in their nature and in respect to the cause from which they proceed. So they must be definite and certain and clearly consequent upon a breach of the contract. *Masterton v. Mayor, etc.*, 7 Hill 61; *Griffin v. Colver*, 16 N. Y. 489; *Mesmore v. N. Y. Shot & Lead Co.*, 40 N. Y. 422; 2 *Sutherland on Damages*, 432, 433; *Philadelphia, etc., R. R. Co. v. Howard*, 13 How. 307; *Fox v. Harding*, 7 Cush. 552; *Sedgwick on Damages* (8th Ed.), Sec. 133, and cases there cited;

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Hadley v. Baxendale, 26 E. L. & Eq. 329, 9 Exc. 341; Hydraulic E. Co. v. McHaffie, 4 Q. B. Div. 670; Harrow Spring Co. v. Whipple Harrow Co., 51 N. W. Rep. 197; Brownell v. Chapman, 51 N. W. Rep. 249.

(Where it clearly appears that the defendant has interrupted an established business from which the plaintiff expected to realize profits, the plaintiff should recover compensation for whatever profits he makes it reasonably certain he should have realized.) Here, as elsewhere, the question is one of fact whether the profits can be proved with reasonable certainty. Sedgwick on Damages, Sec. 182; Lawrence v. Hagerman, 56 Ill. 68; Chapman v. Kirby, 49 Ill. 211; Dobbins v. Duquid, 65 Ill. 464; Smith v. Wunderlich, 70 Ill. 426.

Where one party agrees with another to put in place certain machinery, which the first party agrees and guarantees shall be of certain qualities and possess certain capabilities, such guaranty will be treated as a warranty, and its non-fulfillment will be regarded as a breach of warranty. Underwood et al. v. Wolf, 131 Ill. 425.

A party must comply with the terms of his contract before he can reap its reward. Eldridge v. Rowe, 2 Gil. 91; Schwartz v. Saunders, 46 Ill. 18; Dehler v. Held, 50 Ill. 491; Knickerbocker L. I. Co. v. Seeleman, 83 Ill. 446; Pennsylvania Coal Co. v. Ryan, 107 Ill. 226.

Where the right of a party to recover under the contract is doubtful, and is contested on reasonable grounds, and the amount due him requires to be adjudicated, interest is only recoverable after the right of the party to recover and the amount of the recovery have been determined. The Isaac Newton, 1 Abb. (Adm'r R.) 538; Shipman v. State, 44 Wis. 458; Thorndyke v. Wells Memorial Ass'n, 16 N. E. Rep. 747.

At common law no interest was allowed in cases of this character, as there is here no special agreement for the payment of interest. Its recovery, in this State, depends entirely upon the statute, and if it is not authorized by the statute, no recovery therefor can be had. Harts v. Fowler,

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53 Ill. App. 245; Greenhood v. Town of La Salle, 137 Ill. 230; Fowler v. Harts, 149 Ill. 592.

The interposition of a defense in good faith can not be construed into a withholding of money by an unreasonable and vexatious delay of payment. Aldrich v. Dunham, 16 Ill. 403; West Chicago Alcohol Works v. Sheer, 104 Ill. 586; County of Franklin v. Layman et al., 145 Ill. 138.

APPELLEE'S BRIEF, TATHAM & WEBSTER, ATTORNEYS.

Appellee contended that as to the allowance of interest, in Downey v. O'Donnell, 92 Ill. 559, it was held, that a contract for the erection of a building was an instrument of writing, within the meaning of the statute, upon which interest was properly allowed, and that there is no distinction in principle between a contract for erecting a building, and one for the erection of an ice plant.

In any case, the rule contended for by appellant as the measure of damages, is in violation of all the authorities in this State and elsewhere. It is, stated succinctly, the estimated profits which might have been derived from sales which might have been made of ice that might have been manufactured, if the machines had been in working order at the respective times specified.

The practically unanimous consensus of authority is against the contention that estimated profits form a proper basis of recovery in this case. Green v. Mann, 11 Ill. 613; Priestly v. N. I. & C. R. R. Co., 26 Ill. 206; Phelan v. Andrews, 52 Ill. 486; Benton v. Fay, 64 Ill. 417; Strawn v. Coggswell, 28 Ill. 458; Underwood v. Wolf, 131 Ill. 425; Frazer v. Smith, 60 Ill. 145; Pennypacker v. Jones, 106 Pa. St. 237; Howard v. S. & B. Mfg. Co., 139 U. S. 199; Arctic Ice Mach. Mfg. Co. v. Maryland I. Co., 26 Atl. Rep. 496; S. C., 29 Atl. Rep. 69; Brownell v. Chapman, 51 N. W. Rep. 249; Hutchinson Mfg. Co. v. Peach, 51 N. W. Rep. 930.

"When a defendant fails to furnish machinery for a new use, he can not be held to compensate plaintiff for the profits he might have made. The measure of damages is the ordinary value of the use of the machine." 1 Sedgwick on Damages (8th Ed.) Sec. 183.

"When machinery is not furnished according to agreement the measure of damages is the value of the use of it. Expected profits in such a case are entirely too contingent." 1 Sedgwick on Damages, Sec. 190, and cases cited; *Rogers v. Bemis*, 69 Pa. St. 432; *Griffen v. Colver*, 16 N. Y. 489.

Messrs. KNIGHT & BROWN, also for appellee.

It is contended that the question as to what damages a party can recover upon a breach of contract for the sale of machinery has been settled by the United States Supreme Court. *Howard v. Stillwell*, 139 U. S. 199; *Cincinnati S. G. I. Co. v. The Western S. S. Co.*, 152 U. S. 200. In which cases it is held that prospective profits which might have been realized can not be recovered.

In 2 Greenleaf on Evidence, Sec. 256, in speaking of what damages might be recovered, it is said: "But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as part of the damages occasioned by a breach of the contract." See also *Pennypacker v. Jones*, 106 Pa. St. 237.

In *Thompson v. Shattuck*, 2 Metc. 615, it was held the profits of a mill depending upon the repairs of a dam can not be recovered in an action for failure to make repairs.

In *City of Chicago v. Huenerbein*, 85 Ill. 594, suit was brought for overflow to plaintiff's land, and it was held: "The supposed value of crops which might have been raised was too remote and speculative."

In *Chicago City Ry. Co. v. Howison*, 86 Ill. 215, it was held that profits which might have been made by use of a railway track, were too speculative and uncertain to recover damages upon an injunction bond.

In *Benton v. Fay*, 64 Ill. 417, it was held that no evidence should be received as to probable profits for a failure to comply with the contract to furnish certain machinery.

In *Underwood v. Woif*, 131 Ill. 421, it was held, that the

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damages for breach of a warrant of machinery did not include probable profits or prospective gains.

In *Frazier v. Smith*, 60 Ill. 145, it was held that prospective gains could not be assessed as damages unless there could be shown outstanding contracts to be performed, and it was claimed that the party was deprived of the use of the still for two months, during which time they might and would have manufactured large quantities of alcohol from which they would have derived great gains. It was held that that was prospective and too remote to be an element of damages.

There was no averment of declaration in that case that there were any outstanding contracts, neither is there any such averment in the pleadings in this case.

To the same effect is *Arctic Ice Mach. Mfg. Co. v. Maryland Co.*, 26 Atl. Rep. 496.

In *Brownell v. Chapman*, 51 N. W. Rep. 249, it was held that a party could not recover profit which might have been made by use of a pleasure boat at a summer resort.

In *John Hutchinson Mfg. Co. v. Pruch*, 51 N. W. Rep. 930, it was held that a party could not recover for grain destroyed in testing a flour mill during the time of test, and neither could it recover for prospective profits.

In *Rogers v. Bemus*, 69 Pa. St. 432, it was held that probable profit for the manufacture of lumber would be too remote, contingent and speculative. *Griffin v. Colver*, 16 N. Y. 489, is a leading case in the United States upon this subject, and holds that a party could not recover for prospective profits that might have been made by use of certain machinery for sawing and planing lumber for which the engine sold in that case was intended to drive, and which the plaintiff knew it intended to drive. See also the case of *Jones v. Northrup*, 7 Col. 1; *R. R. Co. v. Richards*, 40 Ill. App. 560; *Hill v. Parsons*, 110 Ill. 107; *Fox v. Harding*, 7 Cush. 516.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In the early part of the year 1890, The Consumers' Pure Ice Company entered into a written contract with the Con-

solidated Ice Machine Company by which the latter undertook for the sum of \$90,000 to build and complete ready for use, in the language of its proposition "one of our most complete and latest improved one hundred and twenty ton ice making plants, consisting of two separate and distinct sixty ton ice machines and appurtenances, apparatus and connections therewith in accordance with the following specifications, viz.:"

The plant was not completed at the specified time, and various disagreements grew out of the contract.

The Ice Machine Company insisted that the delay was caused by the Consumers' Company, that extra work was done for it upon its order, and demanded payment. A considerable amount had been paid upon the contract when the Ice Machine Company became insolvent and appellee was made its assignee.

Appellant and appellee being unable to agree, this suit to recover a balance claimed to be due was brought, with the result of a finding and judgment for appellee, the trial having been by the court without a jury. The following statement by the court appears in the record:

"In this case the finding will be for the plaintiff in the sum of \$40,425. This is made up of \$4,000 extras, interest for three years and one-half at five per cent on \$31,000, \$1,000 is deducted for building and brick in changing smoke stack by agreement and \$8,000 for delay."

We see no sufficient reason for interfering with the conclusion of the court as to the \$4,000 for extras, and \$1,000 for building and brick in changing smoke stack. In respect to these matters the questions are substantially of fact. As to the \$8,000 allowed for delay, we do not agree with appellant in its contention that the proper way to arrive at such damage is to take estimates of the profits that could have been made had the plant been completed when promised.

No method much more likely to mislead could well be devised. Such estimate is purely conjectural. A thousand things might have prevented the realization of the profits sanguine witnesses estimate could have seen. Customers

may fail to pay; rivalry may cause a decline in price; accidents may suspend business; injuries to employes or strangers may cause loss; dishonesty may sweep away funds.

The real reason why estimates of profits that could have been made is not the proper criterion for ascertaining damages in such a case, is because such is not the method pointed out by the law. Calculations as to prospective profits in other enterprises which a party would have engaged in, had his contract with a defendant been fulfilled, are altogether too remote to form the basis of damages occasioned by the breach of such contracts. *Fox et al. v. Harding et al.*, 7 Cushing 516; 2 Greenleaf on Evidence, Sec. 256; *City of Chicago v. Huenerbein*, 85 Ill. 594; *Chicago City Ry. Co. v. Howinson*, 86 Ill. 215; *Frazier v. Smith*, 60 Ill. 145; *Benton v. Fay*, 64 Ill. 417.

When a party being about to embark in a new business is wrongfully prevented by another, he can not recover expected profits, for there is nothing to prove that such profits would have been made. 1 *Sedgwick on Dam.*, Sec. 183; *Green v. Williams*, 46 Ill. 206; *Hair v. Barnes*, 26 Ill. App. 580.

The damage for a failure to supply a machine is the value of the use of it, *i. e.*, what could such a machine have been rented for; what would the rental of such a plant be worth. *Sedgwick on Damages*, Secs. 183, 186.

We therefore see no sufficient reason for disturbing the conclusion of the court that the sum of \$31,000 was due appellee, three and a half years prior to the entry of judgment.

As to the allowance of interest the case of *Downey v. O'Donnell*, 92 Ill. 559, seems to a majority of the court to conclusively establish the right to recover, upon the written contract, interest upon whatever sum has been improperly withheld. See, also, *Morris v. Wifaux*, 47 Ill. App. 630.

Appellant has had the use of this plant for three and a half years, enjoyed for that period the benefit of appellee's services and disbursements, and if by the statute interest is given in such case, we see no hardship therein to appellant.

The judgment of the Circuit Court is therefore affirmed.

Otto Schanzenbach v. George Brough.

1. **PRACTICE—Taking Exceptions.**—Exceptions taken to the action of the trial court in admitting or rejecting evidence, must be specific and show clearly what was excepted to.

2. **SERVICES—Discharge Without Reasonable Cause—Measure of Recovery.**—Where a person is employed at a stated price for a longer term than is allowed by the statute of frauds, and is discharged without cause before the expiration of the period of employment, he is not limited in his recovery to the price fixed by the contract, but may recover what his services are really worth.

3. **INSTRUCTIONS—Contrary Statements out of Court.**—An instruction stating that if the jury "find from the evidence that the plaintiff has, on another occasion, willfully stated or sworn that he was the partner of the defendant during and for the time for which he now seeks to recover wages as a servant, then they are at liberty to disregard his testimony in this trial as unworthy of belief," is erroneous, as it omits the qualifications as to corroboration.

4. **PAYMENT—Burden of Proof.**—The burden of proving a payment is upon the party making it.

Assumpsit for work, labor and services. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard at this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

C. A. FITCH, attorney for appellant.

THOMPSON & CURTIS, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant for wages earned, as the appellee testified, under an employment never put in writing, for five years at \$5 per day.

The appellant admitted the employment at \$5 per day, but only by the day, not by the year, week or month. The appellant claims that he suffered by some irregularities on the cross-examination of the appellee, but the language of the bill of exceptions is simply at the end of each of several colloquies between court and counsel, "exception by counsel for defendant." This is nearer to what is necessary

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than was the case in *Arcade Co. v. Allen*, 51 Ill. App. 305, but yet does not show what the appellant excepted to. The opinion of Scofield, J., in *East St. L. R. R. v. Conley*, 49 Ill. App. 310, is instructive, if attentively read.

The appellee worked for the appellant from March 10, 1890, to April 4, 1891, and as appellant testified, was paid \$1,289. That would leave nearly \$400 due to the appellee and he has recovered \$609.64. But the appellee put in testimony that services of the character that he rendered were worth from \$7 to \$10 per day, and if he was employed for a long term and discharged without cause, he is not limited to the price fixed by his contract, void under the statute of frauds and broken by the appellant, but may recover what his services were really worth. *Wm. Butcher Steel Works v. Atkins*, 68 Ill. 421.

Whether there was cause for the discharge of the appellee was a question for the jury upon so little evidence of any cause, that the abstract shows no instruction upon that subject.

The appellant claims that he should have been allowed as payment the price of some stock bought by him for the appellee, but the abstract does not show that any was bought.

The appellant testified, "I paid for that valve stock," with no more said about any actual purchase or sum paid. If it was bought the appellant no doubt kept it.

The appellee had once filed a bill claiming a partnership with the appellant. The abstract shows that the appellant asked and excepted to the refusal of the following instructions:

"The jury is further instructed that they may take into consideration any declaration or omission, whether verbal or in writing, and proven to have been made by the plaintiff in regard to his business relationship with the defendant for the purpose of determining the credibility and veracity of the plaintiff."

"The court instructs the jury that if they find from the evidence that the plaintiff has on another occasion willfully

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stated or sworn that he was the partner of the defendant, during and for the time for which he now seeks to recover wages as a servant, then they are at liberty to disregard his testimony in this trial as unworthy of belief."

"The court further instructs the jury that the plaintiff, in order to recover, must prove his case by a preponderance of evidence. And in case they, the jury, should find the evidence in this case so nearly balanced as to make it impossible to tell where the preponderance of the evidence lies, then, and in such case, they should find the issues in favor of the defendant."

As to the first, "omission" probably means "admission," but don't so read, and if it had, and had been read to the jury, it is impossible to believe that it would have affected the result.

The second omits the qualification as to corroboration always necessary. *Huddle v. Martin*, 54 Ill. 258.

The third is wholly wrong. That the appellee worked for the appellant was undisputed. The burden of proving payment was upon the latter. *Ranke v. Cobiskey*, No. 5374 last term. On the whole case the judgment must be affirmed.

Rand, McNally & Co. v. Mutual Fire Insurance Co. for the use of Thomas Parker, Jr., Receiver.

1. **RECEIVER—Appointment of—When Not to be Collaterally Attacked.**—Where a court has jurisdiction of the subject-matter, and of the parties to the proceeding in which a receiver is appointed, its action in making the appointment can not be collaterally attacked in an action by the receiver upon a promissory note given to the insolvent corporation.

2. **SAME—Effect of Appointment.**—Where a receiver has been appointed for an insolvent insurance company, the court making the appointment, exercises, at its discretion, the powers of the board of directors as well as such additional power as is conferred upon it by statute.

3. **PLEADINGS—Allegations of Insolvency—Sufficiency.**—In a petition for the appointment of a receiver, an allegation that the assets of an insurance company are insufficient to justify its continuance in business, and to pay its debts and liabilities, is equivalent to an allegation that its

58	528
70	377
58	528
84	600
58	528
92	7

Rand, McNally & Co. v. Mutual Fire Ins. Co.

further continuance in business would be hazardous to persons insured therein, or to the public.

4. *INSOLVENT CORPORATIONS—Assessments by the Court Can Not be Questioned by Members, etc.*—The propriety of an assessment made by the court upon the members of an insolvent mutual insurance company can not be questioned in a suit against a member by a receiver, for the purpose of collecting such assessment.

5. *MUTUAL INSURANCE COMPANIES—Payment of Assessments—Notice—Execution.*—Under section 18, chapter 78, R. S., entitled, "Insurance" if a member of a mutual insurance company neglects or refuses, for the space of thirty days after notice, to pay an assessment for his proportion of a loss incurred, the company may sue for and recover the whole amount of such member's contingent liability, but execution can only issue for assessments and costs as they accrue.

6. *SAME—Notice—Recovery.*—In order to recover the whole amount of a member's contingent liability in a mutual insurance company the notice required by section 18, chapter 78, R. S., entitled "Insurance," must not only be given, but the declaration must contain sufficient allegations of such notice, followed by competent proof, etc.

Assumpsit, for assessments in a mutual insurance company; appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1895; reversed and remanded unless a remittitur is filed, etc. Opinion filed May 16, 1895.

STATEMENT OF THE CASE.

This was an action to recover an assessment made by order of court upon the members of a mutual insurance company. The member sued, a corporation, had given a note, of which the following is a copy:

CHICAGO, ILL.,, 18....

For value received in policy No. 5713, dated the 22d day of March, 1889, we promise to pay to the Mutual Fire Insurance Company the sum of fourteen hundred and seventy dollars, by installments, at such time as the directors of said company may order and assess for the losses and expenses of said company, pursuant to its charter and by-laws.

It is hereby expressly understood and agreed that this note is not transferable, and that there is no liability beyond the face amount thereof.

RAND, McNALLY & Co.,
D. A. ARNOLD, Treas'r.

No. 5713.

The declaration, after setting forth the foregoing, proceeded to allege that after the making of such note and the becoming a member of said company by said defendant, under proceedings instituted by the auditor of this State in pursuance of the statute, Thomas Parker was appointed receiver of said company. That in said proceeding it appearing that all the available assets of said company had been exhausted, and that it was indebted to a large amount which it was unable to pay, upon the report of a master to whom the subject-matter of a petition filed by the receiver had been referred, the indebtedness of the company was found to be more than \$100,000, and that the assets, consisting principally of deposit notes and membership liability, amounted to a little over \$200,000, and that the sum necessary to be assessed upon the deposit notes was \$129,000.

That the matter came on to be heard upon the said petition, answers thereto, the master's report and exceptions thereto, which report was approved and confirmed and the said receiver was directed to assess upon each of the members of said company sixty-five per cent of the premium note and membership liability, which assessment was by said receiver duly made as directed.

That the assessment as made upon the said note executed by appellant, and upon its membership liability was \$955.50. That demand of payment of the same has been made and refused, and therefore the defendant has become liable to pay the entire amount of said note, viz., the sum of \$1,470.

A general demurrer was filed by the defendant, which being overruled, default and judgment for \$1,470 followed.

M. B. & F. S. LOOMIS, attorneys for appellant.

D. J. SCHUYLER and C. W. GREENFIELD, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is first insisted by appellant that the receiver was not legally appointed.

It is alleged in the declaration that in pursuance of the statute a petition was filed against the said Mutual Ins. Co.; that summons was duly served upon said company, and it appeared and filed its answer to said petition; that thereafter in said cause a receiver was appointed. Such being the case we do not think that appellant can in the present suit contest the legality of the appointment of such receiver. The court had jurisdiction of the subject-matter and of the parties in the proceeding in which the receiver was appointed, and its action can not now be collaterally attacked.

The allegation in the petition that the assets of the company were insufficient to justify its continuance in business and to pay its debts and liabilities, was equivalent to an allegation that "its further continuance in business would be hazardous to the insured therein," or hazardous to the public. High on Receivers, Sec. 203.

By the appointment of a receiver the company was restrained from the further continuance of its business. There was a hearing upon the merits; ample opportunity was given the company to deny the allegations of the petitioner.

It is next urged that the appointment made is not in accordance with the charter and by-laws of the company.

A receiver having been appointed, the court exercises at its discretion the powers of the board of directors as well as such additional authority as is conferred by statute.

We do not think that in this suit appellant can question the propriety of the amount of the assessment ordered by the court.

It is manifest that to permit this might result in a multitude of variant decisions as to the magnitude of the assessment to be made.

We do not wish to be understood as holding that appellant can not, in a proper and direct proceeding, attack the assessment for fraud in the making or magnitude thereof; the late case of *Farwell v. The Great Western Telegraph Co. et al.*, is an instance of such attack having been successfully made.

The declaration alleges that notice was given to the

defendant of the assessment, and demand of payment made; and that although more than thirty days have elapsed since the giving of said notice and the making of said demand, the defendant has failed and refused to pay said assessment or any part thereof, and that thereby by force of Sec. 13 of Chap. 73, of the Revised Statutes, the defendant became and is liable to pay to the plaintiff the whole amount due upon the said note, viz., \$1,470.

Section 13 of Chap. 73, Revised Statutes, provides that the board of directors shall, as often as they deem necessary, settle and determine the sum to be paid by the several members thereof, and publish the same in such manner as they may choose, or as the by-laws prescribe. And that "If a member neglect or refuse for the space of thirty days after publication of such notice to pay the sum assessed upon him as his proportion for any loss as found, the directors may sue for and recover the whole amount of contingent liability, with costs of suit, but execution shall only issue for assessments and costs as they accrue."

We do not regard the allegation of notice; there is no charge that notice was published, as sufficient to warrant a judgment for the entire amount of defendant's contingent liability.

The judgment of the Circuit Court will be reversed and the cause remanded, unless appellee shall, within ten days, remit so as to make the amount of the judgment \$955.50, being the sum assessed.

In any event appellant will recover its costs in this court. Reversed and remanded unless remittitur is filed.

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95	*373

**John E. Fitzpatrick, Receiver of the Switchmen's Mutual Aid Association of North America, v.
George Rutter.**

1. CORPORATIONS—*When Corporate Existence Can Not be Denied.*—Where an association assumes a name which imports that it is a corporation, and contracts with persons as if it were a corporation, it can not be heard to deny such representations.

Fitzpatrick v. Rutter.

2. COLLATERAL ATTACK—*Declaration Not Filed in Time.*—Rendering a judgment upon a declaration filed but nine days before the commencement of the term in a matter over which the court had jurisdiction is at most but an error which can not be urged in a collateral proceeding as a reason for disregarding the judgment.

3. COURTS OF EQUITY—*Refuse to Enforce Inequitable Decrees.*—When a court of equity is called upon to enforce a decree rendered in another proceeding it will refuse to do so, if, upon examination, such decree is found to be inequitable.

Creditor's Bill, upon a judgment obtained by default. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

STATEMENT OF THE CASE.

This is an appeal from a decree by the Superior Court of Cook County in favor of appellee.

The suit was upon a creditor's bill, based upon a judgment obtained by default, in the Circuit Court of Cook County, in favor of the complainant and against the Switchmen's Mutual Aid Association of North America, sued as a corporation. The bill alleges that the complainant, while insured in the association in the sum of \$1,000, sustained an injury to his head, which totally incapacitated him from following the business of a switchman, and that the association refusing to pay the claim, the complainant sued the association at law as a corporation and obtained service upon Wm. E. Simsrott, its grand secretary and treasurer.

The bill further alleges that the association represented itself to the complainant and held itself out to the world as a corporation, and that it was a corporation *de facto*.

The association failed to enter an appearance in the law court, and judgment was rendered against it by default; an execution was duly issued and returned "no property found."

The association, by its board of directors, filed its answer to the bill, alleging that it was a voluntary association having several thousand members throughout the United States and Canada; that it was not incorporated under the

laws of this or any other State or country; that it did not hold itself out to the public or to its members as a corporation, and that it was not a corporation *de facto*.

It is further alleged that the board of directors had no knowledge that the judgment in question had been obtained until a creditor's bill was filed in the Circuit Court on the judgment.

A temporary injunction was granted, without notice, restraining the board of directors and officers of the association from collecting or paying out any moneys.

In order to have it dissolved, the association paid \$1,150 into court to abide the result of this suit, and the injunction was thereupon dissolved.

During the pendency of this suit the Circuit Court of Cook County appointed John E. Fitzpatrick receiver of this association, and the said receiver by leave of court was made a party defendant in this cause and filed his answer, which is in substance the same as the answer previously filed by the board of directors. He also filed a cross-bill setting forth substantially the same facts as he stated in the answer and prayed that the judgment be vacated and set aside.

The case was referred to master in chancery Stein, to take testimony and report conclusions. The master took the testimony and reported the date of the filing of the *præcipe*, the issuing of the summons and the return thereupon; that default was taken and afterward set aside and default again taken and judgment entered against the Switchmen's Mutual Aid Association for \$1,050, and that execution issued thereupon; that the declaration was not filed in time for the second term, and that a stipulation was written on the back of the declaration, waiving this objection.

The master further found that Barnum, Humphrey & Barnum had no authority to stipulate for the association, and that even if they had, the facts did not show that they had stipulated waiving this defect.

The master further found that there was no such corporation in existence as the Switchmen's Mutual Aid Associ-

Fitzpatrick v. Rutter.

ation of North America; that it did not hold itself out as a corporation, and that the facts upon which the complainant relied were not sufficient to justify him in believing the association to be a corporation.

The master further found that this was a case wherein a court of equity should refuse to lend its assistance, and recommended that complainant should be relegated to such remedies as he might be able to obtain at common law; and also recommended that receiver's cross-bill be dismissed.

Upon exceptions being filed to the master's report, the court refused to pass on the master's report, or the exceptions thereto, in so far as said report referred to findings of fact or conclusions of fact, but held that the complainant was entitled to a decree, and entered a decree in favor of the complainant, from which decree the receiver has prayed this appeal.

APPELLANT'S BRIEF, JAMES C. McSHANE, ATTORNEY.

While in some cases an association may be estopped from denying corporate existence, yet no conduct upon the part of an unincorporated association will ever make it a corporation. The law prescribes the manner in which a corporation can be formed, and it requires a strict compliance with the statutory regulations in order to incorporate. *Gent v. Mfg. and Merchants Ins. Co.*, 107 Ill. 688; *Diversey v. Smith*, 103 Ill. 388; *Angell & Ames on Corp.*, 11th Ed., Sec. 783; *Creswell v. Oberly*, 17 Brad. 283; *Bigelow v. Gregory*, 73 Ill. 201.

Estoppel *in pais* is based on a fraudulent purpose and fraudulent results. If the element of fraud is wanting there is no estoppel; there must be deception and change of conduct in consequence, in order to estop the party from showing the truth. *Davidson v. Young*, 38 Ill. 146; *Mullanphy Bank v. Schott*, 34 Ill. App. 511; *Powell et al. v. Rogers*, 105 Ill. 318; *Chandler v. White*, 84 Ill. 435; *Meyer v. Erhardt*, 88 Ill. 452; *Flower v. Elwood*, 66 Ill. 447; *Hill v. Blackwell*, 113 Ill. 290; *Mateer v. Green*, 31 Ill. App. 471; *Keith v. Lynch*, 19 Brad. 474.

The bar of estoppel appears to prevail whenever a body, assuming, according to the mode prescribed by law, to be a public or a private corporation, attempts to set up any defect in the steps toward its organization, required by law, against a party who had no notice of such facts when the contract was made. *Bigelow on Estoppel* (4th Ed.), 525; *Dooley v. Cheshire Glass Co.*, 15 Gray, 494.

A voluntary association can only be sued at law by making all of its members parties defendant. 1 *Dicey on Parties to Actions*, 149; *Detroit S. B. v. Detroit A. V.*, 44 Mich. 313; *Niven v. Spickerman*, 12 Johns. (N. Y.) 401; *Pipe v. Bateman*, 1 Ia. 369; *Boyd v. Merriell*, 52 Ill. 151; *Lloyd v. Loaring*, 5 Vesey, 773; 7 Dana 190.

Appellee could not maintain an action against the association at law under any circumstances because he was a member, and one member of a voluntary association can not maintain an action at law against the association or another member. *Huth v. Stamm*, etc., 61 Conn. 227; *McMahon v. Rauhr*, 47 N. Y. 67; *Warren v. Stearne*, 19 Pick. 73; *Bailey v. Bancker*, 3 Hill. 188.

While there may be some doubt as to the association's right to file an original bill to set aside this judgment, yet when this judgment is made the basis of a creditor's bill, this court has the right to refuse to enforce it: (1) Because it is sought to be enforced against the property of parties who are not defendants in the suit in which it was rendered, and (2) because it is a judgment on its face that any court of review would set aside. *Wadhams v. Gay*, 73 Ill. 430; *Durham v. Field*, 30 Ill. App. 123; *Shepherd v. Spear*, 41 Ill. App. 208; *Hamilton v. Houghton*, 2 Bligh. P. C. 169, 193; 2 Dan. Ch. Pr., 1586 (Sixth Am. Ed.); *O'Connell v. McNamara*, 3 Dr. & War. 411; *Heuer v. Schafner*, 30 Ill. App. 337; *Hier v. Kaufman*, 134 Ill. 215; *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552; *Gay v. Parpart*, 106 U. S. 679; *White v. Parnter*, 1 Knapp P. C. 179; *Fadden v. McFadden*, 44 Cal. 306; *Adams' Equity*, *416; *Mitf. Ch. Pl.* 96; *Bean v. Smith*, 2 Mason 252; *Story Eq. Pl.*, Sec. 430.

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APPELLEE'S BRIEF, WM. E. HUGHES, ATTORNEY.

The Circuit Court of Cook County is a court of general jurisdiction, and had jurisdiction of the parties and of the subject-matter. The defendant in the common law proceeding might have appeared and divested the court of jurisdiction to render judgment, by demanding a non-suit. Having failed to do this, it can not now complain and avoid its liability under the judgment. *Cullander v. Gates*, 45 Ill. App. 374.

In a collateral proceeding, the jurisdiction of the Circuit Court to render the judgment must be presumed.

In *People v. Seelye*, 146 Ill. 221, it is said: "If a court has jurisdiction of the subject-matter and the parties, it is altogether immaterial, where its judgment is collaterally called in question, how grossly irregular or manifestly erroneous its proceedings may have been; its final order can not be regarded as a nullity and can not, therefore, be collaterally impeached."

The rule thus laid down has been frequently recognized by this court. *Swiggart v. Harber*, 4 Scam. 364; *Buckmaster v. Carlin*, 3 Scam. 104; *Hernandez v. Drake*, 81 Ill. 34; *Monroe v. People*, 102 Ill. 406; *Kenny v. Greer*, 13 Ill. 432.

Nothing is presumed to be without the jurisdiction of courts of general jurisdiction, except what specially appears to be so.

In *Maloney v. Dewey*, 127 Ill. 402, the bill attacked collaterally the decree of the United States Circuit Court. It was contended, among other things, that the summons was void because not returnable on a day during the term; that the summons was not properly served. It was held that the decree could not be attacked for such irregularities. See also *C. B. & Q. R. R. v. Watson*, 113 Ill. 195; *Jenkins v. International Bk.*, 111 Ill. 462; *Neff v. Smyth*, 111 Ill. 100.

Where there is jurisdiction, a judgment is binding upon all parties until it is reversed in a regular proceeding. See, as affirming the doctrine of the foregoing cases, *Tunesma v. Schuttler*, 114 Ill. 157; *Union National Bk. v. International Bank*, 123 Ill. 510; *Culver v. Phelps*, 130 Ill. 217;

Wenner v. Thornton, 98 Ill. 157; Chudleigh v. C. R. I. & P. Ry., 51 Ill. App. 491; Magnusson v. Cronholm, 51 Ill. App. 473.

"Errors intervening after jurisdiction attaches, and which might have affected the judgment if urged at the proper time and in the proper forum, can not be effectively insisted upon in a collateral proceeding, whether in law or equity." Johnson v. Miller, 50 Ill. App. 60.

"The test of jurisdiction is, whether the tribunal had power to enter upon the inquiry, not whether its methods were regular, its findings right, or its conclusions in accordance with the law."

In Callender v. Gates, 45 Ill. App. 374, the defendants were served in a foreign country. It was held, if they wished to make that objection it was necessary to appear and plead to jurisdiction, and a failure to do so will be considered as a waiver.

The association is estopped to deny it was a corporation *de facto* at the time it was sued. The exercise of corporate powers by an association, in the absence of a compliance with the statutes providing for the incorporation of insurance and indemnity associations, under the facts in this case, constituted the defendant a corporation *de facto*. Its corporate existence, however, was an issue which should have been raised by a plea of *nul tiel corporation*, and it is now too late to seek the advantage of a lack of diligence on the part of the defendant and of such a plea.

Under the decisions in Miami Powder Co. v. Hotchkiss et al., 17 Bradw. 622, U. S. Express Co. v. Bedburn, 34 Ill. 459, and Hudson v. Green Hill Cem. Co., 113 Ill. 618, the Switchmen's Mutual Aid Association of North America is properly held a corporation *de facto*. See, also, Bigelow on Estoppel (4th Ed.), 525; Dooley v. Cheshire Glass Co., 15 Gray 494; West v. Madison Co. Agr. Co., 82 Ill. 205.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The name of the association imported that it was a corporation.

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It contracted with appellee as if it were a corporation, and can not now be heard to deny its representations. U. S. Express Co. v. Bradbury, 34 Ill. 459; Hudson v. Green Hill Cemetery Assn., 113 Ill. 613; Miami Powder Co. v. Hotchkiss, 17 Ill. App. 622.

Appellant can not in this collateral proceeding, object to the judgment obtained against the association whose receiver he is. The court which rendered judgment against the association had jurisdiction over the subject-matter and over the person of the defendant. Its judgment upon a declaration that had been filed but nine days before the commencement of the term, was at most but error, which can not in this proceeding be argued as a reason for disregarding such judgment. Town of Lyons v. Cooledge et al., 89 Ill. 529; People v. Seelyer, 146 Ill. 189; Clark v. Kern, 146 Ill. 348.

It is true that when a court of equity is called upon to enforce a decree rendered in another proceeding, it will refuse to do so, if, upon examination, such decree is found to be inequitable. Wadhams v. Gay, 73 Ill. 430.

We find as the court below did, that nothing appears to show that the judgment against this *de facto* corporation is inequitable or unjust; and appellee was, as appears, entitled to the aid of a court of equity to enable him to realize upon the judgment of the Circuit Court.

The receiver, who has appealed from the order of the court below, should act impartially for the benefit of all the creditors of this association; and unless there are facts existing not shown by the record here filed, we do not see why he should continue to endeavor to deprive appellee, a judgment creditor, of the rights to which his judgment entitled him. See High on Receivers, Sec. 202.

The decree of the Superior Court is affirmed.

City of Chicago v. C. J. Stratton et al.

1. MUNICIPAL CORPORATIONS—*Private Property Not Held in Trust by.*
—The private property of citizens is not held in trust by municipal corporations, while the streets are held in trust for the use and benefit of

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the entire public—for those who own no property as much as for those who own a great deal.

2. *SAME—Delegation of Power.*—The common council of the city of Chicago can not delegate to the owners of a majority of certain lots, the power to determine whether, in a particular locality, the location of a livery stable is unlawful.

8. *LIVERY STABLES—Power of a City to Restrict.*—The keeping of a livery stable is a lawful and useful business; it may be, by a city, reasonably restricted to certain localities, but such right to restrict can not be delegated.

4. *ORDINANCES—Unlawful Delegations of Power.*—An ordinance declaring it to be unlawful for any person to “locate, build, construct or keep in any block in which two-thirds of the buildings are devoted to exclusive residence purposes, a livery, boarding or sale stable, gas house, gas reservoir, paint, oil or varnish works, within 200 feet of such residence, on either side of the street, unless the owners of a majority of the lots in such block fronting or abutting on the street consent in writing to the location or construction of such livery stable,” etc., is void as an attempt to delegate to property owners the power to permit the location of livery stables, etc.

5. *SAME—Valid and Invalid Portions.*—An ordinance prohibiting the location of livery stables in blocks devoted to residence purposes, is valid, but a condition in said ordinance permitting such location upon the consent of a majority of the lot owners is invalid and renders the entire ordinance void.

Debt, for the violation of an ordinance. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

STATEMENT OF THE CASE.

This suit was brought under a section of the building ordinance, and is to recover the penalty for a violation of the ordinance.

The section of the ordinance is as follows: “Sec. 49. It shall not be lawful for any person to locate, build, construct or keep in any block in which two-thirds of the buildings are devoted to exclusive residence purposes, a livery, boarding or sale stable, gas house, gas reservoir, paint, oil or varnish works, within 200 feet of such residence, on either side of the street, unless the owners of a majority of the lots in such block fronting or abutting on the street consent in writing to the location or construction of such

livery stable, gas house, gas reservoir, paint, oil or varnish works therein.

"Such written consent of the property owners shall be filed with the commissioner of buildings before a permit be granted for the construction or keeping of such livery stable, gas house, gas reservoir, paint, oil or varnish works."

The legislature has empowered cities to direct the location of livery stables, in the following terms:

"To direct the location and regulate the use and construction of breweries, distilleries, livery stables, blacksmith shops and foundries within the limits of the city or village."
3 Starr & Curtis' Statutes, 191, paragraph 82.

The defendants admit that they are engaged in the business of keeping a livery stable, boarding and sales stable at Nos. 211 and 213 Evanston avenue, in the city of Chicago. The building which they were occupying on the 7th day of June, 1894, for that purpose, was constructed under a building permit to erect a two-story and basement brick carriage repository and stable in the rear, which was issued July 28, 1893. Instead of building a stable in the rear, it appears that the horses, some thirty or more, were kept in the basement. The building is back about fifty-nine feet from the street and has a plank drive-way running from the entrance of the stable, which is about six feet above the ground, down to Evanston avenue. The livery stable and drive-way are so near to a residence building on the adjoining lot that carriages driving out and in shake the whole building. On the 7th of June, 1894, there were thirty-one buildings in the block in which this livery stable is located, twenty-eight of which were devoted to exclusive residence purposes.

No petition has ever been signed by a majority of the property owners, as required by the ordinance governing the location and keeping of livery stables in the city of Chicago.

This suit was originally brought before a justice of the peace, where judgment was entered against the defendants, and was by the defendants appealed to the Circuit Court of Cook County. Upon the trial before the court, a jury hav-

ing been waived, certain propositions of law, in pursuance of the statute, were offered on behalf of the plaintiff, presenting the question of the legality of the ordinance in question, which the court was requested to hold as the law governing the case, but the court held the section of the ordinance to be invalid and entered a finding for the defendants. Motion for a new trial having been overruled, the court entered judgment upon the finding. The plaintiff brings the case to this court by appeal.

APPELLANT'S BRIEF, FARSON & GREENFIELD, ATTORNEYS.

Cities and villages are expressly authorized to direct the location of livery stables. 3 Starr & Curtis' Statutes, 191, Par. 82.

An express power granted by the legislature to a municipal corporation carries with it everything necessary to make it efficient. *Huston v. Clark*, 112 Ill. 349; *People v. Drainage Commissioners*, 143 Ill. 421; *In re Biederstaff*, 11 Pa. 394; *Alcorn v. Hamer*, 38 Miss. 743.

Statutes of this State and ordinances of a similar character have been recognized by the courts and held to be good in the following cases: *Meyer v. Baker*, 120 Ill. 567; *The People v. Cregier*, 138 Ill. 401; *Griswold v. Brega*, 57 Ill. App. 554; *Boyd v. Bryant*, 35 Ark. 70; *State v. Cooke*, 24 Minn. 247; *Lonsdale Company v. Board of Commissioners*, 25 Atl. Rep. 655.

The ordinance is not a delegation of legislative power to property owners, but provides for a contingency upon the happening of which the ordinance will be inoperative in certain localities. *People v. Reynolds*, 5 Gilm. 1; *People v. Salamon*, 51 Ill. 37; *Groesch v. The State*, 42 Ind. 547; *Guilet v. Chicago*, 82 Ill. 472; *People v. Hoffman*, 116 Ill. 594; *Bull v. Reid*, 13 Grattan (Va.) 78; *Alcorn v. Hamer*, 38 Miss. 652; *Aurora v. United States*, 7 Cranch, 382; *Dunn v. Wilcox County*, 4 So. Rep. 661; *Locke's Appeal*, 72 Pa. St. 494; *Fell v. State*, 42 Md. 71; *Anderson v. Commonwealth*, 76 Ky. 485; *State v. Parker*, 26 Vt. 357.

The decisions on local option are also applicable. Ban-

City of Chicago v. Stratton.

croft v. Eumas, 21 Vt. 456; Clark v. Pratt, 11 So. Rep. 631; State v. Board of Chosen, etc., 52 N. J. L. 398; Paul v. Green County, 50 N. J. L. 585; Sandford v. Court of Common Pleas, 36 N. J. 74; Commonwealth v. Weller, 14 Bush. 218; State v. Wilcox, 42 Conn. 346, 364; Schulherr v. Bordeaux, 64 Miss. 71; In re Hoover, 30 Fed. Rep. 51.

If the latter part of the ordinance is void and the remainder of it is complete in itself, the void part will be stricken out and the balance held to be good. City of Indianapolis v. Bieler, 36 N. W. Rep. 867; Clark v. Ellis, 2 Blackf. 8; State v. Newton, 59 Ind. 173; Ingberman v. Noblesville Tp., 90 Ind. 393; State v. Blend, 121 Ind. 514.

If the council exceed the power granted by the legislature, in passing an ordinance, that part within the power will be held good and the balance of the ordinance *ultra vires*. Kettering v. Jacksonville, 50 Ill. 39; Harbaugh v. Monmouth, 74 Ill. 367; Greenfield v. Mook, 12 Ill. App. 281.

APPELLEES' BRIEF, SAMUEL J. HOWE, ATTORNEY.

All of the powers of a corporation are derived from the law, and its charter, and no ordinance or by-law of a corporation can enlarge, diminish, or vary its powers. Dillon's Munic. Corp., 4th Ed., Sec. 317; Thompson v. Carroll, 22 How. 422; Andrews v. Ins. Co., 37 Me. 256.

The powers vested in municipal corporations, must, as far as practicable, be exercised by ordinances general in their nature and impartial in their operations. Chicago v. Rumpff, 45 Ill. 90; Zanone v. Mound City, 103 Ill. 552.

Ordinances must be reasonable, consonant with the general powers and purposes of a corporation, and not inconsistent with the laws or policy of the State. Tugman v. Chicago, 78 Ill. 405; Clinton v. Phillips, 58 Ill. 102; Trustees v. People, 87 Ill. 303; Rulison v. Post, 79 Ill. 567; Yick Woo v. Hopkins, 118 U. S. 356; In re Tie Loy, 26 Fed. Rep. 611; Peoria v. Calhoun, 29 Ill. 317.

A municipal corporation possesses and can exercise the following powers and no others: First, those granted in expressed words; second, those necessarily or fairly im-

plied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Dillon's Munic. Corp., 4th Ed., Sec. 89; Cook Co. v. McCrea, 93 Ill. 326; Ottawa v. Carey, 21 Fed. Rep. 842.

Public powers and trusts are incapable of delegation. Dillon Munic. Corp., 4th Ed., Sec. 96; Cooley's Const. Lim., 5th Ed., 249; Hickey v. C. & W. I. R. R. Co., 6 Ill. App. 172; Bibel v. People, 67 Ill. 172; E. St. Louis v. Wehrung, 50 Ill. 28; In re Quong Woo, 13 Fed. Rep. 229; Ex parte Sing Lee, 31 Pac. Rep. 245; City of St. Louis v. Russell, 116 Mo. 245.

The city having granted a permit to erect the building and also a license to carry on the business is estopped from taking any action which would interfere with the lawful conduct of the business. Martel v. E. St. Louis, 94 Ill. 67; Roby v. Chicago, 115 Ill. 230.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is urged that the ordinance of the city is not a direction as to the location of livery stables, but a delegation of power to property owners to permit such location.

The ordinance is a direction that no livery stable, gas house, etc., shall be located in any block in which two-thirds of the buildings "are devoted to exclusive residence purposes," unless the owners of a majority of the lots in such block fronting or abutting on the street, shall consent.

In effect the ordinance is, by non-action, a recognition that in other blocks, livery stables, etc., may be located, and in such residence blocks may be, upon consent of the required majority of lot owners.

The ordinance refers the question of whether a livery stable shall be located in certain blocks to the owners of the lots in such block.

Without the consent of such owners it is unlawful to there locate a livery stable; with such consent it is permissible.

If the ordinance had stopped with forbidding the location

of livery stables in such residence blocks, its legality would have been unquestioned; is it rendered invalid by the fact that the restriction designed for the protection of property owners may be removed by a majority of such owners? If the clause permitting a majority of the owners to do away with the restriction is invalid, does its fall carry with it the entire ordinance, or does the restriction remain, not subject to removal?

That public powers and trusts can not be delegated is well established. Dillon on Municipal Corporations, Sec. 96, 4th Ed.; Cooley's Constitutional Limitations, 248; City of E. St. Louis v. Wehrung, 50 Ill. 28; Tregman v. Chicago, 78 Ill. 405-410.

Ordinances as well as statutes of this nature, that is, providing that a restriction may be removed or that license to do acts shall not be given except upon the consent of the owners of specific property, have long been known in this State. Such ordinances and statutes differ from enactments, the taking effect of which is made to depend upon their ratification by vote of the people of a particular locality. In the case last mentioned the legislative body enacts a statute or ordinance, the going into effect of which as an operative law, is made to depend upon a contingency, viz., its approval by vote of the people of a locality for which the law is designed. The power to enact laws to go into effect upon a contingency has always been exercised; most grants of franchises are of this kind. Cooley's Constitutional Limitations, 136; Brig Aurora v. United States, 7 Cranch 382.

Such legislation is not a delegation of a trust or power; it is merely giving a *cestui que trust* an opportunity to say whether it desires to have the power exercised or accepts that offered. People v. Reynolds, 5 Gil. 1; People v. Hoffman, 116 Ill. 584; Home Ins. Co. v. Swigert, 104 Ill. 353; Bull v. Reid, 13 Grattan, 78; State v. Parker, 26 Vt. 357; Lathrop v. Stedman, 42 Conn. 583; Erlinger v. Beneau, 51 Ill. 94.

There is a distinction between the power which city authorities exercise over the use to which private property

may be put, and the control possessed by the city over the use of the public streets.

The private property of citizens is not held in trust by the municipal authorities, while the streets *are* held in trust for the use and benefit of the entire public—for those who own no property as much as for those who have a great deal.

To, in the case of public streets, parks and grounds, surrender or delegate the control over the trust, not to the people of a particular locality, but to the owners of certain property as such, and not to them *per capita*, but in proportion to their property ownership, so that the functions of government are to be exercised, privileges to be given or withheld, not by the people, but by the owners of specific property, the voting power of each being determined by the amount of property possessed, is quite different from merely giving to the owners of certain lots the right to say whether a general restrictive ordinance shall be extended to such property.

A municipal corporation can exercise only such powers as are intrusted to it.

The city of Chicago is nowhere empowered to delegate any of its powers; it may direct the location of livery stables; it can not delegate to certain property holders this power. Dillon on Municipal Corporations, Secs. 96, 716, 779; Tugman v. City of Chicago, 78 Ill. 405; Jackson v. Brush, 77 Ill. 59; State v. Trenton, 42 N. J. L. 42; People's Railroad v. Memphis Railroad, 10 Wallace, 38-52.

A delegation of power by a city is valid if expressly authorized by the legislature. City of Brooklyn v. Breslin et al., 57 N. Y. 591-594.

We are of the opinion that the common council of the city of Chicago could not delegate to the owners of a majority of certain lots the power to determine whether in a particular locality the location of a livery stable should be unlawful.

The keeping of a livery stable is a lawful and useful business; it may, by the city, be reasonably restricted to certain localities, but such right to restrict can not be delegated.

Price v. Engelking.

Can the invalid portion of the ordinance be separated from the remainder so as to leave the latter in force?

The ordinance in question makes, in the blocks under consideration, the keeping of a livery stable unlawful, unless the owners of a majority of certain lots consent, in writing, to such location. It is a penal enactment. Clearly, if the specified owners of a majority of lots should consent in writing to the keeping of a livery stable in such locality, the city could not, by the imposition of fines and penalties under this ordinance, prevent such location.

It follows that the portion following the word "unless" is a necessary part of the ordinance.

Nor do we think that it was the intent of the common council that this ordinance, without the provision following the word "unless," should stand as its direction as to where livery stables, etc., might be located.

The judgment of the Circuit Court is affirmed.

GARY, J.

I agree to the foregoing with many misgivings.

It is important that the question should be settled by the highest authority.

SHEPARD, J., dissents.

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Williamson E. Price, Andrew B. Price and William A. Price v. Mary Engelking, Administratrix, etc.

1. **CONDEMNATION—Title Does Not Pass.**—In condemnation proceedings the judgment does not pass the title to the property sought to be condemned, it simply gives to the public a right to take the property upon paying the value thereof, as determined by the judgment; and this right exists without any corresponding right on the part of the owner to compel the public to take the property at the value determined by the judgment.

2. **SAME—What Passes by a Conveyance.**—A conveyance by one having the title when a judgment in condemnation proceedings is entered

and before possession is taken or payment made, passes the property with all rights and burdens appertaining thereto. The grantee takes subject to the right of the public to acquire the same upon payment of the judgment.

8. EMINENT DOMAIN—*All Real Estate Subject to.*—All real estate is held subject to the right of the public to condemn the same for public use; the only distinction between the holding before and after a judgment in condemnation proceedings, is that thereafter the price which the public must pay in order to obtain the property is fixed.

Agreed Case.—Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

STATEMENT OF THE CASE.

The pending appeal is from the opinion and judgment of the Superior Court in an "agreed case," entered into by appellants, the appellee and the city of Chicago, whereby the question is submitted to the court under the statute as to whether either appellants or appellee are entitled to a certain fund of \$1,528.56 paid into court by the city of Chicago.

The fund in question is the compensation money paid to the city as special assessments under warrant No. 4,280 for benefits assessed in supplemental proceedings in the opening of Hermitage avenue by condemnation in case No. 47,875, entitled, "The City of Chicago v. Hapgood et al."

On March 6, 1874, a petition was filed by the said city to condemn, with other property, the west thirty-three feet of the north 289 5-10 feet of the west half of block 7, in Assessors' Division of E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ Sec. 18, 39 and 14, for the opening of Hermitage avenue. Albert Price was then the owner of the property. He died October 13, 1874; the premises became the property in fee simple of the sons of said Albert Price, the appellants herein.

On May 3, 1876, the verdict of the jury in said condemnation proceedings was filed, awarding to the "owner" or "owners" of the west thirty-three feet of said block 7 the sum of \$2,092.66. On August 7, 1876, a judgment was

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entered in the said proceedings, adjudging to the "owner or owners" of the said west thirty-three feet of block 7 the sum of \$2,092.66, and ordering that upon the payment into court, for the use of such "owner or owners," the city should take possession.

The city took possession of the 33-foot strip in 1884, but no claim was made for the \$1,528.56, the proportion of the said special assessments coming to the "owner or owners" of the north 289 5-10 feet of the said west thirty-three feet until 1893 or 1894, the money lying in the city treasury.

In the meantime, about a year after the condemnation judgment, by full warranty deed, dated March 7, 1877, appellants and their wives conveyed the said north 289 5-10 feet of said west half of block 7 by metes and bounds, including the west 33-foot strip, to one Henry Engelking.

The deed recites, in the granting clause: "This conveyance is made subject to condemnation of one-half on Hermitage avenue by the city of Chicago."

Immediately upon purchasing the property, Engelking subdivided the same into fifteen lots and streets and alleys as "Engelking Subdivision, etc.," the plat being recorded June 21, 1877. On that plat the west thirty-three feet is marked off as "Hermitage avenue," and marked on said Hermitage avenue appears, "As opened, City v. Hapgood, No. 47,875."

Nine lots in the subdivision front on Hermitage avenue and one, lot 6, sides upon it.

Engelking immediately conveyed all the lots, by trust deeds, duly recorded, by lot numbers according to the said plat, all of which said trust deeds on lots contiguous to Hermitage avenue, except lot 6, were duly foreclosed in 1878, and that by September 11, 1878, all the lots in said subdivision were sold by said Engelking by warranty deeds, duly recorded, to various parties, said deeds describing the said lots by lot numbers according to the plat.

It appears that the 33-foot strip dedicated as Hermitage avenue was never assessed for taxation subsequent to the year 1877.

Appellants claim the fund, and allege the following reasons:

First. Because appellant's rights under the condemnation judgment were fixed, and they could only be divested by assignment in express terms. Conveyance of the property condemned by warranty deed does not carry with it the compensation under the judgment.

Second. Granting, for the sake of argument, that the warranty deed carried with it the compensation money, nevertheless the reservation in the granting clause withheld the fund to appellants.

Third. In no event can Engelking's administratrix recover

APPELLANTS' BRIEF, WOOLFOLK & BROWNING AND STAPP & ARNOLD, ATTORNEYS.

It is the universal rule in Illinois and elsewhere that a deed of the land condemned or damaged, does not carry with it the right to the compensation money or damages; such right can only be transferred by specific assignment. Penn Mutual Life Ins. Co. et al. v. Heiss et al., 141 Ill. 35, pages 65 and 66; King et al. v. Mayor, etc., 102 N. Y. 171; Drury v. Midland R. R. Co., 127 Mass. 571, 579; Mil. & Northern R. R. v. Strange, 63 Wis. 178.

APPELLEE'S BRIEF, GEO. P. WHITCOMB, ATTORNEY.

Appellee contended that the judgment was conditional only, not binding on the city to take or pay for the land, unless the city should at its option take it. The city had a right to repeal the ordinance on which the condemnation proceeding was based, or to dismiss its suit at any time, provided it had not taken possession of the land and no demand for payment of the compensation had been made. C. & N. W. Ry. Co. v. Chicago, 148 Ill. 141; C., R. I. & P. R. Co. v. Chicago, 143 Ill. 641; Hyde Park v. Dunham, 85 Ill. 569.

The condemnation judgment vested no right nor gave any right whatever to anybody, except as it authorized the

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city, after payment of the compensation to the owner, to take possession of the land. *Ayer et al. v. City of Chicago*, 149 Ill. 262; *Chicago v. Barbian*, 80 Ill. 482; *C. & I. R. R. Co. v. Hopkins*, 90 Ill. 316; *C. & N. W. Ry. Co. v. Chicago*, 148 Ill. 141.

Until payment of the compensation to the owner for his land he has a right to do as he pleases with it. *Schrieber v. C., E. & I. R. R. Co.*, 115 Ill. 344; *Kerfoot v. Breckenridge*, 87 Ill. 209; *C. & I. R. R. Co. v. Hopkins*, 90 Ill. 321.

The owner of land sought to be condemned has the same right to sell and convey the land after the condemnation judgment as he had before.

The city acquired no title or right of possession to the land by the judgment, nor could under it, until it paid to the owner the compensation awarded. *Schrieber v. C., E. & I. R. R. Co.*, 115 Ill. 340; *Chicago v. Barbian*, 80 Ill. 482; *South Park Com. v. Dunlevy et al.*, 91 Ill. 49.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is the settled rule in this State that in condemnation proceedings the judgment does not pass the title to the property sought to be condemned; it simply gives to the public a right to take the property upon paying the value thereof as determined by the judgment; in other words, after judgment the public has a right to acquire at a fixed price. This right exists without there being any corresponding right upon the part of the owner to compel the public to take the property at the value determined by the judgment. It is like a unilateral contract; the option is strictly with the public. *C. & N. W. Ry. Co. v. City of Chicago*, 148 Ill. 141. As a consequence, neither the ownership nor title is divested by the judgment in such proceedings, and a conveyance by one having the title when such judgment is entered and before possession taken or payment made, passes the property with all rights and burdens appertaining thereto, precisely as if no such judgment had been rendered, save that the grantee takes as the grantor,

held subject to the right of the public to acquire the same upon payment of the amount of the judgment. All real estate is held subject to the right of the public to condemn the same for public use; the only distinction between the holding before and after a judgment in condemnation proceedings is that thereafter the price which the public must pay in order to obtain the property is fixed.

When, therefore, appellants, after judgment, conveyed these premises to Henry Engelking, they conveyed all the rights which they had growing out of the ownership of this property. If nothing further was done by the city, Henry Engelking would have remained the owner they made him. As thereafter the city paid into court the amount of the judgment, the administratrix of Henry Engelking is entitled to such money. It was paid for his land, his title, his possession, not that of appellants.

The views here expressed are in accordance with the opinion of this court in *Rice v. The City of Chicago*, 57 Ill. App. 558.

The clause in the conveyance, "This deed is made subject to condemnation of one-half of Hermitage avenue by the city of Chicago," was not a restriction of the granting terms of the instrument, but a mere indication that against the effect of such proceedings the grantors made no undertaking.

In this suit only the rights of appellant and appellee are involved. It is therefore unnecessary to consider what is urged concerning the supposed claims of others.

The judgment of the Superior Court is affirmed.

**Jennie Bee, Executrix, etc., of Joseph Bee, Deceased, v.
Michael J. Tierney and Michael C. McDonald.**

1. *ACCOUNT STATED—Evidence of.*—A mere admission of indebtedness is no evidence of an account stated unless made to the creditor or to his representative. An admission to a stranger is not enough.

2. *SAME—Presumptions of Acquiescence.*—Where a bookkeeper testi-

Bee v. Tierney.

fied that he prepared a statement of a debtor's account, put it in a stamped envelope properly addressed, and placed it in an open mail box from which the postman always took away the mail, and that he never knew of any objection by the debtor to the statement, *it was held* that there was some presumption of assent to the statement, sufficient to go to the jury.

3. *SAME—Requisites.*—An account stated need not be any agreement between the parties that a specific sum is due. An implied acknowledgment that all but one item is correct, may be relied upon by the creditor as an account stated.

4. *BOOK ACCOUNTS—What Evidence of.*—An entry upon the books of a party, while evidence against him of the truth of the entry, is not an admission to anybody, and a suit can not be maintained upon it without showing what it is for.

Assumpsit.—Account stated. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the March term, 1895. Reversed and remanded. Opinion filed May 16, 1895.

APPELLANT'S BRIEF, PADEN & GRIDLEY, ATTORNEYS.

The depositing in the postoffice of a letter properly addressed with the postage prepaid, is *prima facie* evidence that the person to whom it was addressed received it. Evidence that letters were so deposited is competent, and should be submitted to the jury to be weighed by them in connection with the other evidence in the case. They alone have the right to decide whether the inference that the letters were received, founded upon the probability that the officers of the government will do their duty, and that the letters will be duly delivered, is overcome by other evidence. 13 Am. and Eng. Enc. of Law, 260, and cases there cited. *Rosenthal v. Walker*, 111 U. S. 185; *Huntley v. Whittier*, 105 Mass. 391.

As between debtor and creditor, an account rendered by one party and retained by the other without objection, is evidence of an account stated. The rule seems to be that as between merchants, an account rendered and not objected to within a reasonable time, becomes a settled account, which is conclusive as between the parties, unless some fraud, mistake, omission or inaccuracy is shown. *McCord v. Manson*, 17 Ill. App. 118; *Mackin v. O'Brien*, 33 Ill. App. 476; *Greene*

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Co. v. Smith, 52 Ill. App. 159; Bailey v. Bensley, 87 Ill. 556; Wiggins v. Burkham, 10 Wall. (U. S.) 129; Lockwood v. Thorne, 18 N. Y. 235.

It is well settled law that express assent to an account rendered is not required, but that any unequivocal act indicating assent to the account as rendered, will make it a stated account, and this may be inferred from circumstantial evidence. 2 Greenl. on Ev., Sec. 126; 1 Chitty Pl., 373; 1 Story Eq. Jur., Sec. 526; Cochrane v. Allen, 58 N. H. 250, and cases cited; Claire v. Claire, 10 Neb. 54.

Ledger pages are the declarations in writing of both defendants as to the condition of the account between plaintiff and defendants, and of the existence of an indebtedness owing to plaintiff from both defendants. Dows v. Naper, 91 Ill. 44; Loewenthal v. McCormick, 101 Ill. 143; Alling v. Wenzel, 27 Ill. App. 516; Abbott's Trial Evidence, 218; Cawley v. People, 91 Ill. 249.

BRIEF OF APPELLEE McDONALD, EDWARD MAHER AND
CHARLES C. GILBERT, ATTORNEYS.

Under the law the evidence was insufficient to sustain the allegations of an account stated. Hopkinson v. Jones, 28 Ill. App. 420; McGeoch v. Hooker, 11 Ill. App. 653; 1 Chitty on Pleading, *358, *359.

An account stated imports prior transactions between the parties. Sutphen v. Cushman, 35 Ill. 186; Bradley Fertilizing Co. v. So. Pub. Co., 17 N. Y. S. 587.

An account stated further imports an agreement between the parties as to the amount due, and a promise by the debtor to pay. Smith v. Curlee, 59 Ill. 221; McCormick v. Sawyer (Mo.), 15 S. W. Rep. 998; Frost v. Clark (Ia.), 882; Robertson v. Wright, 17 Gratt. 534; Thomlinson v. Earnshaw, 14 Ill. App. 595; 1 Wait's Actions and Defenses, 191, 192, 480; Toland v. Sprague, 12 Pet. 335; Zacarmo v. Pallotti, 49 Conn. 38; Loventhal v. Morris, 15 So. Rep. (Ala.), 672; 1 Chitty on Pleading, *358, *359.

In an account stated the original cause of action is unimportant and the action is based on the new promise to pay.

Bee v. Tierney.

Throop v. Sherwood, 4 Gilm. 92; Christofferson v. Howe (Minn.), 58 N. W. Rep. 830; 1 Wait's Actions & Defenses, 191, 192.

From the fact that a letter properly stamped and addressed is deposited in the postoffice arises an inference or presumption that it was received by the addressee. Such inference does not arise when the letter is deposited in a private mail box. Comm. v. Jefferies, 3 Allen 563; U. S. v. Babcock, 3 Dill. C. C. R. 573; Tanner v. Hugh, 53 Pa. St. 290; First Nat. Bank v. Manigel, 69 Pa. St. 159; Sullivan v. Kuykendall, 24 Am. Law. Reg. (N. S.) 450; Huntley v. Whittier, 105 Mass. 536; Wiggins v. Burhans, 10 Wall. 129; 1 Greenleaf on Evidence, Sec. 402.

Even if the law presumes or infers the receipt of a letter on the presumption that public officers will do their duty, it must appear that the letter was properly mailed. If an inference is made by the law, the facts supporting the inference can not also be inferred—they must be proved. U. S. v. Ross, 92 U. S. 283; Grand Trunk R. Co. v. Richardson, 91 U. S. 470; Anderson Law Dictionary, tit. Presumption, 807; Whately Logic b. IV, c. 111, Sec. 1; Reynolds' Stephens' Evidence, Art. 1, Chap. 1.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The court directed the jury to find a verdict for the defendants, the appellees. The appellant is the executrix of her late husband, Joseph Bee, who commenced this suit, but died while the suit was pending. The object of the suit is to recover for goods sold by Joseph Bee in his lifetime, as it is alleged, to the appellees, doing business as M. J. Tierney & Co.

The appellant made no effort to prove the actual sale and delivery of the goods, but endeavored to recover upon an account stated. She put in evidence a copy of a page of what we shall assume was the ledger of the appellees, showing a balance to the credit of the deceased, under the name of the National Boiler Works, of the amount of the balance sued for. We assume that such copy was competent evi-

dence of what was on it, but it contained no items, and was therefore no evidence of the sale of any specific goods. Indeed the appellant only claims that it was evidence of an account stated. It is said that a mere admission of indebtedness is no evidence of an account stated, unless made to the creditor or some representative of the creditor. 2 Greenleaf on Evidence, Sec. 126. To a stranger, it is not enough. An entry upon the books of a party, while evidence against that party of the truth of what is entered, is not an admission to anybody, and a suit can not be maintained upon simple indebtedness without showing what it is for.

On the 7th day of June, 1892, the bookkeeper and cashier of the deceased prepared a statement, of which a copy was put in evidence by the appellant, showing the account of the deceased against the appellees from the 1st day of January, 1892, to May 27, 1892, put it in a stamped envelope addressed to the appellees, and placed it in an open mail box in the office of the deceased from which the postman always took any mail that might be there. The witness, that bookkeeper, stated that he never knew of any objection by the appellees to that statement. Upon these facts there is some presumption of assent by the appellees to the statement (1 Greenl. Ev., Sec. 40, note 4, and 197, note 4; B. S. Green Co. v. Smith, 52 Ill. App. 158), and of an account stated. 1 Story's Eq., Sec. 526.

Now, whether upon circumstances shown by the record, but not necessary to narrate, such presumption could be rebutted, or the credit upon the books of the firm explained away, are questions of fact to be left, under proper instructions, if asked, to the jury.

We do not intend to intimate any opinion upon the merits of the case; only to say that there was not such an absence of evidence on the part of the appellant as justified taking the case from the jury. Whether, on the appointment of a receiver for the firm, attention to the business was wholly abandoned to him, does not appear, nor can we infer that it was.

An account stated need not be any agreement between the parties that a specific amount is due. An implied ac-

Illinois Live Stock Ins. Co. v. Koehler.

knowledge to a clerk, who has no authority to waive anything, that all but one item is correct, may be relied upon by the creditor as an account stated. *Chisman v. Count*, 2 Man. & Gr. 307; 40 E. C. L. 615.

This must be upon the principle that the creditor may accept the debtor's statement, when it is brought to his knowledge, and treat it as an account stated. If so, why may not the statement on the debtor's books be so accepted?

The judgment is reversed and the cause remanded.

Illinois Live Stock Insurance Company v. Jacob Koehler et al., for use, etc.

1. **LIVE STOCK INSURANCE—Waiver of Conditions.**—A condition in the policy of insurance upon a horse, that the company would not be liable if he died out of the State, unless written permission by the company to remove him be indorsed on the policy, may be waived by the officer of the company by whom such permission, if given, would have been indorsed on the policy.

2. **SAME—Value of Stock Insured.**—A policy of insurance containing a provision that no animal shall be insured for more than half its cash value, is in the nature of an admission by the company, if made with knowledge of the property, of the proper ratio between the value and the sum insured.

3. **INSTRUCTIONS—Where the Verdict is Right.**—Where the verdict is right, valid objections to instructions, although given on behalf of the successful party, may not be considered.

Assumpsit, on a policy of insurance. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

REMY & MANN, attorneys for appellant.

BOOTH & BOOTH, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

By this record we are required to, and a majority of the court does, believe that there was a Norman blood horse, five years old, that weighed three thousand pounds.

The appellant insured the appellees against loss by death of the horse in the sum of \$1,000 for one year from noon of June 6, 1893. The horse expired eleven hours before the policy did.

There are two questions of fact in the case. When the horse was insured he was here. The policy provided that the appellant would not be liable if the horse died out of the State, unless written permission by the appellant to remove him was first indorsed on the policy. The horse died in Indiana.

The strong preponderance of the testimony is that that provision of the policy was waived by the officer of the company by whom such permission, if given, would have been indorsed, and that the reason why it was not indorsed was that the policy was not readily accessible. If that be true the appellant is estopped to set up as a defense that the horse died out of the State. *Man. & Mchts. Ins. Co. v. Armstrong*, 145 Ill. 469.

That the company had notice that the horse went out of the State was undisputed, and there was a special reason for his going in the fact that he was exhibited as a show.

The other question is the value, the policy providing for paying not more than half of the value. The verdict was for the sum insured with interest. The only evidence of the value is that about the time of the insurance he was sold for \$1,400 cash. Whether the purchaser made a good or bad bargain does not appear.

There was testimony that some one connected with the appellant, who he was, or how connected is not shown, only that he was in the office, had seen the horse; that the appellant solicited the insurance, and offered to insure for \$2,000. The policy in terms provides that "no animal shall be insured for more than half its cash value."

A policy is in the nature of an admission by the company, if made with knowledge of the property, of the proper ratio between the value and sum insured.

There are valid objections to instructions given for the appellees, but as the verdict is right, we will leave them unconsidered. The judgment is affirmed.

John M. Krause et al. v. Adolf Kraus et al.

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1. **CONTRACTS FOR THE SALE OF LAND—Implied Conditions.**—In every contract for the sale of land, a condition is implied for a good title, and if the sale is of a lease, the implied condition is that the lessor had such a title as made the lease good.

2. **PLEADING—Necessary Allegations.**—It is a general rule applicable to pleadings in equity as well as at law, that whatever is necessary to entitle a party to relief, must be alleged.

3. **SAME—Waiver of Objections to Title—What Amounts to.**—An agreement for the sale of a leasehold estate provided that if an attorney (naming him) should be of the opinion that the title was not such as the agreement called for, a deposit should be returned, and the bill for specific performance of the agreement averred that the attorney passed upon the abstract of title and was of the opinion that the title was such as the agreement called for. *It was held* that such approval was no part of the contract itself, and was at most but a waiver of objections, if there were any, to the title of the premises in question.

Bill for Specific Performance.—Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

APPELLANTS' BRIEF, PENCE & CARPENTER, ATTORNEYS.

A party may waive a condition precedent to the performance of a contract, even after default, in which case he can not insist upon the forfeiture provided for in the contract as the result of such non-performance. Ex parte Gardner, 4 Younge & Col. 503; Wood v. Machu, 5 Hare 158; King v. Wilson, 6 Beav. 124; Wood v. Bernal, 19 Vesey 220; Cutts v. Thoday, 13 Sim. 206; Hipwell v. Knight, Younge & Col. 401; Izard v. Kimmel, 26 Neb. 51; Thayer v. Star Mining Co., 105 Ill. 547; Watson v. White, 152 Ill. (adv.) 364; Insurance Co. v. Norton, 96 U. S. 234.

MORAN, KRAUS & MAYER and WOOLFOLK & BROWNING, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is a bill filed by the vendor for a specific performance of a contract for the sale of a leasehold estate.

The bill alleges of Krause that "in the matter of the voluntary assignment of said Herman Hermann, still pending in the County Court of Cook County, he was appointed assignee of all the estate and effects of said Herman Hermann, insolvent, which estate and effects, among other things, consisted of a leasehold estate in * * *; that said lease bears date the 15th day of November, A. D. 1872, and was executed by George A. Ingalls." There is no averment of any title in Ingalls, nor any further showing how any title of Hermann passed to Krause.

The agreement which the bill seeks to enforce provided that if the firm of Kraus & Mayer, of which firm Kraus was a member, should be of the opinion that the title was not such as the agreement called for, the deposit should be returned, and it is averred that Kraus did pass upon the abstract of title, "and was of the opinion that the title of said premises was such as was agreed upon in said contract, and did pronounce the title and said leasehold interest to the premises described in said contract good and sufficient in Krause. The contract itself described the leasehold only as under a lease," which "was till 1905, at an average rental of \$2,484 per year."

In every contract for the sale of land, a condition is implied for a good title, and if the sale be of a lease, that the lessor had such a title as made the lease good. Fry, Spec. Per., Sec. 354; Purvis v. Rayer, 9 Price 488.

It is a general rule, applicable to pleadings in equity as well as at law, that whatever is necessary to entitle the party to relief, he must allege. Neither the briefs of the parties, nor our own limited search, furnish us with an instance of any reference to this rule in a case of this character. The appellants probably rely upon the charge that Kraus approved the title as being sufficient. But such approval is inconclusive. The aid of equity will not be given upon it. Jenkins v. Hiles, 6 Vesey 646.

Such approval is no part of the contract itself, and while it may have been essential to the appellants as in the nature of a condition precedent, as to Krause, at the most, it was but a waiver of objections, if any there were to the title,

Kammerer v. Gallagher.

and should, to be of any avail, have been pleaded as a waiver, not only stating the fact of approval but that it waived objections. Dan. Chy., 372.

We suspect that although the demurrer to the bill assigned as one of the grounds that the bill did not show "any ability in said complainants to perform said alleged contract," and that ground is to some extent argued in the brief of the appellees, yet the special aspect in which that ground of demurrer presents itself to us, is of our own discovery; but as it seems to us a good ground for sustaining the demurrer and dismissing the bill, we affirm the decree.

Frank G. Kammerer v. Cornelius H. Gallagher.

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1. *NEGLIGENCE—Right of Recovery for Injuries.*—In order to entitle a person to recovery for personal injuries sustained by reason of the negligence of another, such person must show that he was himself at the time in the exercise of that care which a reasonable, prudent and cautious man would take to avoid injury under like circumstances.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. GEORGE W. BLANKE, Judge, presiding. Heard in this court at the March term, 1895. Reversed and remanded. Opinion filed May 16, 1895.

JOHN H. BATTEN and DENT & WHITMAN, attorneys for appellant.

JAMES C. McSHANE, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Upon the uncontroverted facts of this case the appellee ought not to recover. The appellant owns two two-story frame houses, old, in a neighborhood which is in a transition state from low class residence to business, separated by a passage from the front sidewalk toward the rear of the premises, several feet lower than the front of the houses and sidewalk. Fences ran along the inner edge of the sidewalk inclosing small plots in front of the houses. The passage was about three and one-half feet wide. Each

story of each house was occupied by a different tenant, holding by the month. The duty to repair or keep in repair was therefore upon the appellant. *Payne v. Irvin*, 44 Ill. App. 105; 144 Ill. 482.

Just within the entrance to that passage, at the end of a short cross-walk leading from the sidewalk to the passage, stairs or steps in the passage were, and for considerable time had been, broken and dilapidated, though how much, is not easy to ascertain.

From three o'clock in the afternoon until ten o'clock at night of the 8th day of September, 1891, the appellee spent the hours with a party of friends in the front room of the first story of one of the houses. He boarded there. He had never been up or down the steps, but had seen people going into, or coming out of, the passage.

At ten o'clock he wished to go to the rear of the premises without—for a sufficient reason—going through the house. Without any precaution, he walked into the passage, which was dark, and by reason of some break in the steps, fell, and has recovered for the injury alleged to have been sustained by the fall. The law of this State has, after a long deviation, returned, and now holds “as a condition to recovery by the plaintiff that the person injured be found to be in the exercise of ordinary care for his own safety.” *L. S. & M. S. Ry. v. Hessions*, 150 Ill. 546.

“Ordinary care is that care which a reasonable, prudent and cautious man would take to avoid injury, under like circumstances.” *C. & A. R. R. v. Adler*, 129 Ill. 335.

No prudent and cautious man, not escaping from danger, would in the night plunge into a dark passage way between dilapidated houses, either with knowledge that steps whose condition was unknown to him went down, or with no knowledge of what was there. A man of wealth so acting would be a desirable defendant at the suit of some one upon whom he fell and injured.

In principle, though perhaps not in degree, this case is like *Butterfield v. Forrester*, 11 East 60, often cited with approbation by the Supreme Court.

The judgment is reversed and the cause remanded.

Peoria Grape Sugar Company v. H. D. Turney et al.

1. **ADMISSIONS**—*By Failing to Act with Promptness.*—Between business men accustomed to receive and accept or object to statements of account with promptness, the reception and retention of an account without objection within a reasonable time, may be treated as an admission of its correctness.

2. **PRESUMPTIONS**—*Correctness of Account—When They Do Not Arise.*—A refusal to settle in accordance with an account is most effective in preventing the raising of an implied presumption of its correctness.

Assumpsit, for coal sold and delivered. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1895. Reversed and remanded. Opinion filed May 16, 1895.

STATEMENT OF THE CASE.

This was an action to recover for coal sold and delivered. The action was in the court below claimed and treated as being based upon a written contract introduced in evidence.

MORAN, KRAUS & MAYER, attorneys for appellant.

RUNNELLS & BERRY, attorneys for appellees.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The written contract introduced in evidence bears date and appears to have been made February 1, 1894. The suit was for coal delivered in December, 1893, January and February, 1894.

It is manifest that only the February coal can have been delivered under the written contract.

The written contract in any event fixes the price of coal delivered in February only. Before a recovery could be had for coal delivered previous to the making of this contract, the price or value of such coal must be shown. It was therefore error to instruct the jury to find for the plaintiff

according to bill rendered, unless the making of such bill constituted in connection with the retention thereof, or some admission, implied or otherwise, of the defendant, an account stated.

There was no such evidence of an account stated as made the account presented, *prima facie* evidence of the correctness thereof.

Between business men accustomed to receive and accept or object to accounts with promptness, the reception and retention of an account, without objection within a reasonable time, may be treated as an admission of its correctness. That is, such admission may be implied from a failure in such case to object within a reasonable time to the account. Wharton on Evidence, Sec. 1140; Green v. Smith, 52 Ill. App. 158.

A refusal to pay or to settle in accordance with an account is a most plain objection to it. Appellant was asked by appellees to pay his account; it refused, unless, as a condition, the contract of February 1st was canceled.

Such refusal was as effective in preventing the raising of an implied presumption of the correctness of the account as if appellee had offered to pay the account if one thousand dollars was deducted therefrom, or the price of the coal therein mentioned reduced to fifty cents per ton.

The judgment of the Superior Court is reversed and the cause remanded.

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Western Union Telegraph Company v. C. W. Beck.

1. TELEGRAPH COMPANIES—*Claims for Delay in Delivering Messages.*—A regulation requiring the sender of a message to present his claim for damages in writing promptly to the company is not an unreasonable one. Considering the character of its business, such regulation would be necessary for its own protection and to enable it seasonably to ascertain the facts in the case, and to secure or preserve the proper evidence.

2. SAME—*Presentation of Claims for Damages.*—The court holds that certain correspondence stated in the opinion does not constitute a suffi-

Western Union Telegraph Co. v. Beck.

cient notice of a claim for damages against a telegraph company for a failure to deliver a message.

Trespass on the Case.—Negligence in the delivery of a telegraph message. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1895. Reversed and remanded. Opinion filed May 16, 1895.

WILLIAMS, HOLT & WHEELER, attorneys for appellant.

J. W. COCHRAN, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The argument of the appellant seems to concede that the appellant was negligent in the delivery of a message sent at 5:45 P. M., December 7, 1893, as follows:

“CHICAGO, December 7, 1893.

To Herman Welk, Attorney, Lemont, Ill.:

Have all witnesses here to-morrow at 10 A. M. Lewandowski case first one, and none other on trial. Answer to 1393 Harvard street, at once.

C. W. BECK.”

The message was upon a blank of the appellant at the head of which was printed:

“Send the following message subject to the terms }
on back hereof, which are hereby agreed to.” }

And on the back:

“All messages taken by this company are subject to the following terms:

The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.”

The appellee testified that he had been in the habit of sending telegrams by the appellant, and was familiar with the blanks used. It is unnecessary for the purposes of this case to set out the testimony as to how the appellee suffered loss by the neglect of the appellant.

It is not denied by the appellee that the cases Wolf v.

Western Union, 62 Pa. St. 83, and *Cole v. Western Union*, 33 Minn. 227, holding that the provision for notice is reasonable, are good law. He insists that he complied with it by the following correspondence, all the letters to the appellant being on letter heads like this one:

"People's Casualty Claim Adjustment Company, Suite 77, 175 Dearborn Street, Telephone Main 631.

THOS. W. SPRAGUE,

Pres. & Treasurer.

C. W. BECK, Manager.

F. W. C. MAYES, Counsel.

W. H. BALLARD, M. D.,

Medical Examiner."

"CHICAGO, December 9th, 1893.

Mr. F. A. Tubbs, Supt. Western Union Tel. Co., City.

DEAR SIR: On the 7th of December, 1893, at about 5:45 P. M., I sent a message to Herman Welk, at Lemont, Ill., writing the same on one of your full rate blanks, and paying sixty-one cents to the cashier for the same. The message was to the effect that Mr. Welk bring to the city all the witnesses in an important law suit. The importance of it was readily seen on reading the same, nevertheless the message was not delivered to Mr. Welk that night, nor until late the next day. The consequence was that the case was called, and we were put to a great deal of expense and trouble and annoyance, and the case had to go over until next week, all on account of the neglect of your company.

The object of this letter is to inform you that we expect your company to pay us whatever the actual loss is on account of the delay of this message. Had it not been for the fortunate fact that the other side was not quite ready and did not push us very much your company would probably have had a great deal more to pay.

Please advise me as soon as possible what you will do in the premises to make good to us the loss sustained.

Yours truly,

PEOPLE'S CASUALTY CLAIM ADJUSTMENT CO.,

Per C. W. BECK, Manager."

Western Union Telegraph Co. v. Beck.

“CHICAGO, December 15th, 1893.

Mr. F. A. Tubbs, Supt. Western Union Telegraph Co.,
City.

DEAR SIR: Enclosed please find affidavit of Herman Welk, the receiver of the message about which I wrote you several days ago.

Please let us have a conclusion to this matter as promptly as possible. Yours truly,

PEOPLE'S CASUALTY CLAIM ADJUSTMENT Co.,
Per C. W. BECK, Manager.”

“CHICAGO, January 15th, 1894.

Mr. F. A. Tubbs, Gen. Supt. W. U. T. Co., City.

DEAR SIR: On December 9th, I wrote you in relation to the delay of a message which I sent to Herman Welk, at Lemont, Illinois, to bring some witnesses to this city in the Lewandowski case, which was to be tried the day following, which delay cost us a good deal of money and annoyance. You replied that you would investigate the matter and advise us. As yet we have heard nothing from you. We place our claim at \$150, actual loss, money paid attorneys for their attendance in court and other expenses to which we were subjected, and we received no benefit from them on account of the delay of this message. Please let me hear from you at once. Yours truly,

PEOPLE'S CASUALTY CLAIM ADJUSTMENT Co.,
Per C. W. BECK, Manager.”

“CHICAGO, January 16th, 1894.

Mr. C. W. Beck, Manager, 125 Dearborn St., City.

DEAR SIR: Your letter of yesterday is received and contents noted. I regret that the matter is still under investigation. As soon as a result is obtained you will hear from me.

Yours respectfully,
J. H. SCOTT, Supt.”

The appellee never presented any other claim in writing, and testified that he thought the appellant would settle sooner by signing his letters with the name of the Casualty Company.

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Now it can hardly be contended that if Smith has a claim, letters from Jones stating that he has a claim would avail Smith.

Suppose these letters from the Casualty Company had been signed with the name of any other officer of the company they would have been of the same effect as now. In either case such letters are the act of the company, presenting a claim of the company, and of nobody else.

This question was left to the jury, and they naturally found a verdict against the company, contrary to the undisputed fact.

The court probably, if asked, would have decided the question rightly. The appellee did not intend to present a claim on his own behalf to the appellant, in fact, intended that it should understand that he had no claim.

The letter of December 9th relates his personal acts, and makes very clear what he personally did, and what the company claim in consequence; draws the distinction between "I" and "we" or "us" without ambiguity.

The judgment is reversed and the cause remanded.

James K. Crooks et al. v. Hibbard, Spencer, Bartlett & Co.

1. *VARIANCES—Must be Pointed Out.*—A variance between the pleadings and the proofs must be pointed out in the court below, and an opportunity given to amend against it.

2. *APPELLATE COURT PRACTICE—Motions for New Trials—Grounds.*—Where a motion for a new trial does not set forth that the damages were excessive, the point can not be raised on appeal.

Assumpsit, for goods sold and delivered. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

REMY & MANN, attorneys for appellants.

ROSENTHAL, KURZ & HIRSCHL, attorneys for appellee.

Aylsworth v. Moore.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee brought suit against appellants and recovered judgment for \$1,000; from this appellants have appealed.

Appellants insist that the court below erred in these particulars :

1st. In refusing to find for the appellants upon the first and second amended counts of appellee's declaration because of the variance between each of them and the proof.

2d. In refusing to find for appellants upon the common counts, since the evidence did not make a case under them.

3d. In refusing to find for appellants because of the insufficiency of appellee's proof in not showing an offer by appellee to arbitrate.

4th. In awarding excessive damages to appellee.

As to the error first charged it is sufficient to say that no variance was pointed out, and an opportunity given to amend against it. *McCormick v. Durand*, 37 Ill. App. 167, 168; affirmed, 136 Ill. 178; *L. S. & M. S. Co. v. Ward*, 33 Ill. 511, 516, 517.

If the court erred in not finding for appellants upon the common counts, such error is not shown to have been of any consequence. There was no agreement to arbitrate that constituted any defense to this suit.

The appellants' motion for a new trial did not set forth that the damages awarded were excessive. We have examined the evidence and see no sufficient reason for thinking the judgment to be opposed to the law and the evidence.

The judgment of the Circuit Court is affirmed.

W. A. Aylsworth v. James E. Moore and William J. Moore, Copartners.

1. APPELLATE COURT PRACTICE—*Insufficient Abstract*.—Where the abstract shows no exceptions taken, the court will not look into the record to see if any were taken.

Trover.—Appeal from the Circuit Court of Cook County; the Hon.

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Jahn v. Kelly.

FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

D. T. DUNCOMBE, attorney for appellant.

D. D. O'BRIEN, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The abstract shows a declaration, plea, trial, verdict and judgment in trover, but shows no exception taken to anything. We do not look to the record to see if any exceptions are there. *Wabash R. R. v. Smith*, 58 Ill. App. 419; *Woven Cord Bed Spring Co. v. Coxedge*, 50 Ill. App. 335; *Richey v. Dunham*, 50 Ill. App. 246.

The judgment is affirmed.

G. H. Carl Jahn v. John T. Kelly.

1. AGENCY—*What Constitutes Burden of Proof.*—The burden of showing the existence of an agency is upon the party who alleges it.

Assumpsit, for a breach of contract. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

STATEMENT OF THE CASE.

This was an action brought to recover damages for breach of a contract for the conveyance of certain real estate. Defendant filed a plea of the general issue and a plea of the statute of frauds. Upon the trial, after plaintiff's evidence was in, the court excluded the evidence and instructed the jury to bring in a verdict for the defendant.

The transaction upon which appellant's claim is based is substantially as follows:

About the middle of the year 1890, B. A. Ulrich & Sons, a

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firm of real estate brokers, addressed a letter to the appellee, asking whether the real estate in question owned by him was for sale, and if so, upon what price and conditions he would sell it.

In answer, they received by mail a postal card describing the property by lot and block number, and giving the price as \$4,000, terms, one-third cash, balance one and two years.

On July 26, 1890, Ulrich & Sons addressed another letter to appellee in the following words:

“DEAR SIR: Please let me know what is the lowest price you will accept for your property, No. 4929 State street.

Respectfully yours,

B. A. ULRICH & SONS.”

Upon this letter the appellee wrote the following words:

“\$4,200, on time; \$1,000, cash; 1 and 2, or 1, 2 and 3 years, or \$4,100 cash is the lowest price I will take.

Yours respectfully,

JOHN T. KELLY.”

This letter with Kelly's indorsement on it was mailed to Ulrich & Sons, who then proceeded to find a customer for the property.

It was advertised by them as being for sale, and thereafter an agreement for a deed was drawn, which was signed by B. A. Ulrich & Sons, as agents for appellee, and by appellant in person.

GOLDZIER & RODGERS, attorneys for appellant.

SIDNEY SMITH and AUSTIN A. CANAVAN, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

There is no evidence showing that Ulrich & Sons had any authority to make for appellee an agreement to sell this or any other property.

They wrote to appellee asking him what he would accept

for certain property. He replied that he would take \$4,200. If Ulrich & Sons had replied that they would take it upon the terms he gave, it might be that a contract to sell to them would thus have been made; but there was in his reply no authority to them to act as his agents or sell to some one else. He may have been willing to sell to them on time, but not to appellee. The judgment of the Circuit Court is affirmed.

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North Chicago Street Railroad Co. v. Lemuel M. Ackley.

1. **CHAMPERTY**—*Contract to Pay a Portion of the Amount Recovered is Not.*—There is no law or public policy in this State which deprives a person claiming a right, from contracting to pay for legal services, in vindicating it, a stipulated portion of the thing, or of the value of the thing, when recovered, dependent solely upon such recovery, instead of paying or contracting to pay absolutely, a sum certain.

2. **ATTORNEYS AND COUNSELORS**—*Contingent Fees—Damage Suits.*—A person having a right of action for personal injuries sustained, may lawfully contract with an attorney at law to prosecute a suit for the recovery of damages for a contingent fee, to be paid from the amount recovered.

3. **ASSIGNMENT**—*Of a Right of Action—Effect Of.*—The assignment of an interest in a right of action for a personal injury which is to be prosecuted in the name of the assignor, with an agreement to assign a corresponding interest in the judgment which might be recovered in the future, is equivalent to an equitable assignment of the specified interest in the judgment the moment it is perfected, and binds all parties having notice or knowledge of the same.

4. **ATTORNEY AND CLIENT**—*Contracts Between—When Binding upon the Adverse Party.*—A person having a cause of action against a railroad company for personal injuries, contracted with an attorney to prosecute a suit for the same for a contingent fee of one-half the amount of the recovery, and agreed to assign one-half of the judgment when recovered. During the absence of the attorney from the court, the railroad company, with knowledge of the contract existing between the plaintiff and the attorney, compromised the action by allowing judgment for a sum certain to be entered against it, and satisfied the same by paying the full amount to the plaintiff. The plaintiff having failed to pay the attorney, and being insolvent, he brought suit against the railroad company for an amount equal to one-half of the judgment and recovered.

North Chicago St. R. R. Co. v. Ackley.

5. APPELLATE COURT PRACTICE—*Abandoned Points*.—A point which, under the assignment of errors, might have been raised by the appellant, but which was not, must be considered as waived or abandoned.

Bill in Equity for Relief.—Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

EGBERT JAMIESON and VAN VECHTEN VEEDER, attorneys for appellants.

It is contended that the agreement in question is not an assignment of any portion of the fund expected to be recovered, but is a mere promise to pay "a sum equal to one-half of the gross amount recovered or received," a promise which gives no lien in equity upon the fund. *Bromwell v. Turner*, 37 Ill. App. 563, and authorities cited; *Story v. Hull*, 143 Ill. 506; *Trist v. Child*, 21 Wall. (U. S.) 441; *Lamont v. Railroad Co.*, 2 Mackey (113 D. C.) 507; *Christmas v. Russell*, 14 Wall. (U. S.) 70; *Kusterer v. City of Beaver Dam*, 56 Wis. 475; *Rogers v. Hosack*, 18 Wend. (N. Y.) 319; *Hoyt v. Story*, 3 Barb. (N. Y.) 262; *Christmas v. Griswold*, 8 Ohio St. 558; *Ford v. Garner*, 15 Ind. 298; *Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 447; *Humphrey v. Browning*, 46 Ill. 485.

A right of action for personal injuries is not assignable. *Chicago & Alton R. R. Co. v. Maher*, 91 Ill. 314; *Norton v. Tuttle*, 60 Ill. 134; *Prosser v. Edmunds*, 1 Younge & Coll. 481; Ill. Land & Loan Co. v. Speyer, 138 Ill. 145; *Rice v. Stone*, 1 Allen (Mass.) 568; *Linton v. Hurley*, 104 Mass. 353; *Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 446; *Oliwell v. Verdenhalven*, 26 N. Y. St. Rep. 116; *Averill v. Longfellow*, 66 Me. 237; *Swanston v. Morning Star Mining Co.*, 13 Fed. Rep. 216; *Central R. Co. v. B. & W. R. Co.*, 87 Ga. 388; *Hunt v. Conrad*, 47 Minn. 557.

The agreement sought to be enforced is maintainous and champertous. *Thompson v. Reynolds*, 73 Ill. 13; *Phillips v. So. Park Comrs.*, 119 Ill. 636; *Norton v. Tuttle*, 60 Ill. 134; *DeHoughton v. Money*, 2 Ch. App. 169; *Key v. Vattier*, 1 Ohio 68; *Goodrich v. Tenney*, 44 Ill. App. 331;

Gillet v. Logan County, 67 Ill. 261; Sprye v. Porter, 7 E. & B. 58, 81; Powell v. Knowler, 2 Atk. 224.

L. M. ACKLEY, *pro se*.

It is contended that a person who has a right of action against a street railroad company for a personal injury, and not money enough to pay attorney's fees, can make a valid assignment of such cause of action or of any verdict or judgment that he may recover therein, to secure the fees of an attorney who is employed to enforce it. Citing Peoria Insurance Co. v. Frost, 37 Ill. 333; Lake Erie R. R. Co. v. Middlecoff, 150 Ill. 27; Over v. Lake Erie R. R. Co., 63 Fed. Rep. 34; Cunningham v. Evansville R. R. Co., 102 Ind. 478, and cases cited at 482; 1 N. E. Rep. 800; Crum v. Sawyer, 132 Ill. 443; Savage v. Gregg, 51 Ill. App. 281; Savage v. Gregg, 150 Ill. 161; Hodson v. McConnell, 12 Ill. 170, and other cases.

All rights of action for torts which survive to the personal representative, may be assigned so as to pass an interest to the assignee which he can assert in a civil action in his own name. Tyson v. McGuinness, 25 Wis. 656; Quin v. Moore, 15 N. Y. 432; Dininny v. Fay, Sheriff, 38 Barb. 18; Merrill v. Grinnell, 30 N. Y. 594; McKee v. Judd, 12 N. Y. (2 Kern) 622, and Waldron v. Willard, 17 N. Y. 466; Grant v. Ludlow, 8 Ohio St. 1; Robinson v. Weeks, 6 How. Pr. 161; Slawson v. Schwabaker, 4 Wash. St. 783; Pomeroy's Remedies and Remedial Rights, Secs. 146, 147, n. 1, 148, 149, 150.

Mere personal torts, which die with the party and do not survive to the personal representatives, are not capable of passing by assignment, and, conversely, a cause of action which does survive to a personal representative can be enforced in the name of an assignee. This test was laid down notably in Zabriskie v. Smith, 13 N. Y. 322; Bliss on Code Pleading, Sec. 37; Byxbie v. Wood, 25 N. Y. 707; Pomeroy's Equity Jurisprudence, Sec. 1275; R. R. Co. v. Henderson, 1 Lea (Tenn.) 1; Weire v. Davenport, 11 Iowa 49; National Exchange Bank v. McLoon, 73 Me. 498; Coughlin v. N. Y. Cent. R. R., 71 N. Y. 444; Hoyt v. Thompson, 1

Paige (N. Y.) 320; Fried v. N. Y. Cent. R. R. Co., 43 N. Y. Sup. Ct. 1; Whittaker v. N. Y. R. R. Co., 1886, 3 N. Y. State Rep. 537.

In Illinois, actions for personal injuries survive. Section 123, administration act, says: "In addition to the actions which survive by the common law, the following shall also survive: Actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, and actions against officers for misfeasance, malfeasance or nonfeasance of themselves or their deputies, and all actions for fraud or deceit."

Under this statute and the reasoning of the above authorities a right of action for personal injuries is assignable. This has been expressly decided in Iowa where there is a similar statute. *Vimont v. Chicago R. R.*, 21 N. W. Rep. 9; see also *Zogbaum v. Parker*, 66 Barb. (N. Y.) 341; *Zogbaum v. Parker*, 55 N. Y. 120; *Murphy v. McGrath*, 79 Ill. 594; *Grant v. Ellis*, 26 Mich. 201; *Rogers v. Windoes*, 48 Mich. 628; *North v. Turner*, 9 S. & R. 244; *Butler v. R. R. Co.*, 22 Barb. 110; *Purple v. Hudson R. R. Co.*, 4 Durr's N. Y. Supre. Ct. 79; *R. R. Co. v. Freeman*, 57 Tex. 156; *Chateau v. Boughton*, 100 Missouri 406; *Snyder v. R. R. Co.*, 86 Mo. 613; *Rooney v. 2d Ave. R. R.*, 18 N. Y. 368; *Christie v. Sawyer*, 44 N. H. 298.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The bill alleges that complainant, the appellee, was an attorney at law; that one Mary Butler had received certain personal injuries, stating their nature, for which she had a right of action against the defendant, the appellant, for the prosecution of which she desired his legal services upon a contingent fee, and thereupon a written agreement between him and her was entered into, as follows:

"Whereas, on or about the 7th day of July, A. D. 1891, Mrs. Mary Butler received certain personal injuries through

an accident caused by the negligence of certain employes of the North Chicago Street Railroad Company, and desires to enforce payment of damages for said injury, without advancing attorney's fees therefor, it is agreed by and between said Mrs. Mary Butler and L. M. Ackley, attorney at law, that said Ackley shall take exclusive charge of said matter, and prosecute such parties as he may deem liable for said injuries, and begin and prosecute diligently to final settlement such suits or legal proceedings as he may deem necessary, and shall receive for his services under this contract a sum equal to one-half the gross amount recovered or received on account of said injuries; and to secure payment of said fee the said Mrs. Mary Butler hereby assigns to said Ackley and his assigns one-half of said right of action, and agrees to assign in proper legal form in writing, upon request, one-half of any verdict or judgment which may be had or recovered by reason of said accident and injury, court costs and actual necessary expenses to be advanced by Mrs. Mary Butler, who also agrees not to compromise or settle said claim, or to have any dealings with any person in reference thereto, other than said attorney. In the event of a settlement of said claim before the aforesaid case is on trial call, the charge for services shall be less than one-half, in proportion to the work done up to the date of such settlement.

MARY BUTLER. [SEAL.]

L. M. ACKLEY. [SEAL.]

Dated Chicago, September 2, 1891."

A collateral agreement between complainant and said Butler with reference to the employment of associate counsel to work with him in the case, and that associate counsel was engaged by complainant, for whose services complainant had become liable, was also alleged.

It was alleged, also, that on the next day after the making of said agreement, and in reliance thereon, the contemplated suit was begun by the complainant, and that from that time on for a space of more than two and a half years, complainant spent much time and rendered necessary and

important services, setting them forth, in connection therewith; that finally said cause was reached on the call of the calendar, and on complainant's motion was set for trial; that while on the trial call, and awaiting its turn for trial, the defendant, appellant, through its attorneys, without the knowledge or consent of appellee, settled the cause with said Butler, called up the case out of its order, and had judgment entered therein against appellant and in favor of said Butler, for \$3,750 and costs, and paid the same to said Butler, and had said judgment satisfied of record, all of which it is alleged was done in fraud of appellee's rights.

It is also alleged: "That prior to the making of said settlement and payment of \$3,750 to said Mary Butler, said North Chicago Street Railroad Company had full knowledge and notice of said contract in writing, of the employment of associate counsel and of the services rendered as aforesaid, and of the complainant's rights under said contract."

The bill further alleges that said Mary Butler has informed complainant that she has none of the money that was so paid to her, and that she is insolvent, and that his rights will be wholly lost unless his contract and said assignment are enforced against the defendant, the appellant, and prays that the appellant be decreed to pay him the one-half of said judgment so recovered against appellant by the said Butler.

The defendant, appellant, was defaulted, and a decree *pro confesso* entered against it for \$1,875, being one-half of the judgment aforesaid.

Upon this appeal it is urged, on the part of appellant, that a right of action for personal injuries is not assignable; that the right of action has become merged in the judgment, which remains satisfied of record; that the agreement between appellee and Mary Butler is not an assignment of any portion of the fund expected to be recovered, but is a mere promise or personal covenant to pay, or assign, which gives no lien in equity upon the fund; that the agreement is champertous; and that the affidavit to the bill is of no legal effect.

The bill was one that need not have been sworn to. Whether, therefore, the affidavit to it was sufficient in law is of no consequence. If the allegations in the bill were sufficient, the confessing of them, whether they were sworn to or not, justified a decree in accordance with them.

It was said in *Newkirk v. Cone*, 18 Ill. 449, that our statute (Section 27, Chap. 38, Hurd's Revised Statutes), defining and providing for punishment of maintenance, under which general name champerty is embraced, seems to have abolished the common law offense, with its divisions and distinctions, and to have substituted, in its stead, a statutory offense under the general name of maintenance; and the holding, in that case, that there is "no law or public policy in this State which would deprive a person claiming a right, from contracting to pay for legal services in vindicating it, a stipulated portion of the thing, or of the value of the thing, when recovered, dependent solely upon such recovery, instead of paying, or contracting to pay, absolutely, a sum certain," has never to our knowledge been certainly receded from.

A possible distinction might exist if the attorneys were to agree to carry on the litigation "at their own cost and expense." *Phillips v. So. P. Commissioners*, 119 Ill. 626.

The same element, that the attorney agreed to "pay all necessary expenses" in prosecuting the claim, existed in *Thompson v. Reynolds*, 73 Ill. 11, where *Newkirk v. Cone* is reviewed and distinguished from that case, but not necessarily overruled.

Smith v. Young, 62 Ill. 210, was a case where the Supreme Court upheld the contract, although the attorney there agreed to pay "all necessary expenses and costs himself."

We agree that the decisions in this State seem to vacillate upon the question, but without indulging in an extended review and comparison of them, it appears to us that no one of them go so far as to hold that a contract like the one in question is void as being champertous, and we are not inclined to go to that extent. *Dunne v. Herrick*, 37 Ill. App. 180.

The changed conditions and better civilization of to-day as compared with what existed in England, when the common law rule prevailed, afford reason, as held in many States, for the material restriction of that doctrine. Clark's Criminal Law, Chap. XIII, p. 324.

As said in *Newkirk v. Cone*, *supra*: "The suitor may be unable to pay in advance and without credit, or he may deem such an arrangement (for a contingent fee) most prudent and best calculated to insure vigilance on the part of his counsel; and if he has a cause of action, the courts are and should be open for its legal prosecution."

The other contentions of the appellant require but slight mention in the view we take of what was done and agreed to be done by Mary Butler, by the terms of said agreement with appellee.

Whatever may be the law with regard to the assignability of a right of action for a personal injury, concerning which there are numerous authorities of great weight on both sides, there ought not to be much dispute that the assignment in this case of an interest in the right of action, which was to be prosecuted in her name, together with an agreement to assign a corresponding interest in the judgment which should be recovered in the future upon such right of action, worked an equitable assignment of the specified interest in that judgment the moment the judgment was perfected, upon the principle that in equity that which is agreed to be done will be considered as done. 1 Story's Eq. Juris., Sec. 64 g; Freeman on Judgments (12th Ed.), Sec. 425.

"An equitable assignment is such an assignment as gives the assignee a title which, though not cognizable at law, equity will recognize and protect," and to support such an assignment there must be an actual appropriation of the fund, or of some designated part, proportion or per cent of it. *Story v. Hull*, 143 Ill. 506.

We think there was here, what was equivalent, in equity, to an assignment of a definite proportion of the judgment that was recovered, and that if the appellant had notice of

such assignment, the payment of the whole judgment to Mary Butler was made at its risk.

Whether there was a sufficient allegation of notice to appellant of the rights of appellee under the contract in question, is a serious question with us.

The allegation of notice was as hereinbefore quoted, and omits all mention of to what agent or officer of the appellant corporation notice was given. *Evans v. Schriver Laundry Company*, 57 Ill. App. 150; *Primmer v. Patten*, 32 Ill. 528; *Newell v. Board of Supervisors*, 37 Ill. 253; *Trustees of Schools v. Otis*, 85 Ill. 179; *Schultz v. Plankinton Bk.*, 40 Ill. App. 462.

But as the appellant has not argued, nor even alluded to the question of want of notice, in its brief, we will presume that, even though the errors assigned are sufficient to cover it, the question is waived, or abandoned. *W., St. L. & P. Ry. Co. v. McDougal*, 113 Ill. 603; *City of Mt. Carmel v. Howell*, 137 Ill. 91.

The decree of the Superior Court will therefore be affirmed.

MR. PRESIDING JUSTICE WATERMAN.

The contract of assignment upon which the decree in this cause is based is not, in my judgment, such a one as the law favors or a court of equity will enforce against persons not parties thereto.

The contract is not of claim or right of action against any particular person, but is of a roaming nature, authorizing the attorney to go forth "seeking whom he may devour," and to bring and prosecute diligently to final settlement, not judgment, "such suits or legal proceedings as he may deem necessary." It is manifest that if this instrument be valid and enforceable, its validity has not yet been exhausted, and who may be the next victim of this omnivorous power of attorney no one can tell.

Neither public policy, courts of law or equity have ever leaned to the fomenting of litigation or to the discouragement of settlements out of court.

So far as there is any definiteness in the contract under

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consideration, it would seem to be of a right of action against "certain employes of the North Chicago Street Railroad Company," by whose negligence, not that of the Street Railroad Company, an accident to Mrs. Mary Butler, it is said, was caused.

One-half of this right of action Mrs. Mary Butler purports to assign, and "agrees not to compromise or settle said claim or to have any dealings with any person in reference thereto, other than said attorney."

Rule C. C. C. C. expressed in Greenhood on Public Policy, page 474, is: "A contract by which the control of the party in interest over litigation carried on in his behalf, is limited, is void." Boardman v. Thompson, 25 Iowa 487; Elwood v. Wilson, 21 Iowa 523; Lewis v. Lewis, 15 Ohio 715.

It is urged that if contracts of this kind are not sustained, then whoever may receive an injury through the negligence of another will be remediless.

How this follows is not explained, unless counsel mean to insist that every poor person who receives a personal injury is dishonest, and that no lawyer can or will rely upon the promise of such person to pay him a fair fee for successfully prosecuting his claim to judgment.

That a rule of law should be established by which the army of small employers, farmers, grocers and others, the multitude of individuals who must engage and become liable for the negligence of servants, are to find in each case, great and small, petty and important, that all right of honest, fair and just settlement with an injured party has been contracted away to professionals, is not to my thinking in accordance with the welfare of the injured individual, the State, or sound public policy.

Samuel B. Foster v. S. Swaback, Thomas D. Tansey et al.

1. **MECHANIC'S LIENS.**—*Fraud in Building Contracts.*—In proceedings under section 29, chapter 82, R. S., entitled "Liens," providing that if it appears to the court that the owner and contractor fraudulently, for the purpose of defrauding sub-contractors, fixed an unreasonably low price

58	581
60	620
58	581
64	262
58	581
66	610
58	581
87	478

in the original contract for the erection of a building, such fraud must be alleged and clearly shown by the evidence in order to authorize the court to act.

2. *SAME—Proceedings Under Section 29.*—A bill in equity filed under section 28, chapter 82, R. S., entitled "Liens," is not an appeal to the conscience of the court to do equity, but is a method to ascertain and dispose of purely statutory liens, and it is only persons having liens under the statute that a decree in favor of can be rendered.

3. *MASTER IN CHANCERY—Conclusions on Contradictory Evidence.—Fraud.*—On pure questions of fact the report of the master, where the evidence is voluminous and contradictory, carries with it much of the weight and conclusiveness which rightfully attaches to the verdict of a jury, but the question as to whether fraud follows from a state of facts is necessarily a mixed question of law and fact.

4. *FRAUD—Under the Mechanic's Lien Law.*—The fraud that is provided against under section 29, chapter 82, R. S., entitled "Liens," is that which has its inception between the owner and the original contractor for the ultimate purpose of defrauding the sub-contractor.

5. *SAME—Mistaken Opinion.*—A mistaken opinion as to the value of city lots is not equivalent to a fraud, as contemplated by section 29, chapter 82, R. S., entitled "Liens."

6. *BUILDING CONTRACTS—Limitations on the Power to Make.*—The owner and contractor may contract upon such terms as they can agree to, provided only that they do not fraudulently combine for the purpose of defrauding sub-contractors, by fixing an unreasonably low price for the building.

7. *SUB-CONTRACTORS—Right to Examine the Original Contract.*—The right of a sub-contractor to a lien depends upon the contract between the owner and the original contractor, and it is his privilege to inform himself about the terms of the original contract, and if not satisfied with them, to refuse to deal with the contractor.

8. *SUB-CONTRACTOR'S LIEN—Allowance of a Special Privilege.*—The allowance of a lien to a sub-contractor is a special privilege, and it is not unreasonable to require him to look to the principal contract to ascertain whether it is such as to justify him in becoming a contractor under it.

Bill for a Settlement Under Section 29 of the Mechanic's Lien Law.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1895. Reversed and remanded. Opinion filed May 16, 1895.

APPELLANT'S BRIEF, SAMUEL W. JACKSON, ATTORNEY.

Sub-contractors are not given liens absolutely, but only upon complying with the statutes in regard to giving notice. The statute does not give a sub-contractor, me-

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chanic, or person furnishing material to the original contractor a lien absolutely, without notice to the owner of the rights of such sub-contractor, mechanic or materialman. *Butler v. Gain*, 128 Ill. 23.

The statute giving a mechanic, a materialman or sub-contractor a lien on the premises of the owner of a building erected or repaired, is in derogation of the common law, and is to be strictly construed; therefore, a party seeking a lien under its provisions must show a clear compliance with all the requirements of the statutes. *Butler v. Gain*, Id. 27; *St. Louis National Stock Yards v. O'Reilly*, 85 Ill. 546; *Kelly v. Kellogg*, 79 Ill. 477; *Belanger v. Hersey*, 90 Ill. 70; *Carney v. Tully*, 74 Ill. 375; *Canisius v. Merrill*, 65 Ill. 67; *Cook v. Heald*, 21 Ill. 429.

If the sub-contractor does not give notice no lien can be created. *Shaw v. Chicago Sash and Door Co.*, 144 Ill. 520; *St. Louis National Stock Yards v. O'Reilly*, 85 Ill. 546.

This notice is only waived when the contractor makes the sworn statement as provided by the statute. *Butler v. Gain*, 128 Ill. 26; *Shaw v. Chicago Sash and Door Co.*, 144 Ill. 527.

A sub-contractor's lien is limited to amount due original contractor. There is no privity of contract between the owner and sub-contractor whose lien depends upon the validity and terms of the original contract. Under the earlier acts no lien was allowed a sub-contractor. *Dawson v. Harrington*, 12 Ill. 300.

The money which may remain in the hands of the owner, and due to the original contractor, after all deductions are made to which the owner is entitled, is the fund, and the only fund, out of which the contractors are to be paid. *Culver v. Ewell*, 73 Ill. 536; *Marski v. Simmerling*, 46 Ill. App. 531.

Knowledge, by a sub-contractor upon a building, that there is an agreement in writing between the original contractor and the owner, is sufficient to put him upon inquiry as to the contents of the writing and charge him with notice thereof. *Bowen v. Aubrey*, 22 Cal. 566.

In the absence of fraud or misrepresentation by the owner, this presumption of full knowledge of the terms of the original contract is conclusive against all sub-contractors, laborers and materialmen, and they are bound by the terms of the original contract, so far as any claim upon the owner, or right of lien upon his premises under the statute, are concerned. *Henley v. Wadsworth*, 38 Cal. 356.

To constitute actual fraud between two or more persons, to the prejudice of a third, contrivance and design to injure such third person, by depriving him of some right, or otherwise impairing it, must be shown. Actual fraud is not to be presumed, but ought to be proved by the party who alleges it; and if the motive and design of an act may be traced to an honest and legitimate source equally as to a corrupt one, the former ought to be preferred. *Jackson v. McConnel*, 1 Scam. 344.

It must be affirmatively shown like any other fact. *Wright v. Grover*, 27 Ill. 426; *Schroeder v. Walsh*, 120 Ill. 403.

H. C. BENNETT and W. A. PHELPS, attorneys for Edward Baggot and Orr & Lockett Hardware Co., appellees.

WILLIAM F. WIEMERS, for F. J. Switzer, appellee.

LYMAN M. PAINE, for Chicago Incandescent Light and Wiring Company, appellee.

IRA W. & C. C. BUELL, for Andrew Dressel, appellee.

PEASE & McEWEN, for John Henry and Elmer W. Evans, appellees.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a bill filed by the appellant, the owner of a certain city lot therein described, for a general settlement under the provisions of Sec. 39, Chap. 82, Rev. Stat. Ill., pertaining to mechanic's liens.

The bill alleged *inter alia*, that on November 13, 1891, the appellant entered into a contract in writing with one Thomas

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D. Tansey, whereby the said Tansey agreed to furnish all the material and labor required to erect and complete a three story and basement store and flat building for the appellant upon his said lot, according to certain plans and specifications, and to build and complete the same within one hundred days from said date in a good and workmanlike manner under the direction of the architect, and to the satisfaction of the appellant, for the consideration of \$3,000 in money to be paid, and four certain lots, to be conveyed to said Tansey by the appellant.

According to the terms of the said contract, the cash part of the consideration was to be paid in installments, at specified times, and the lots were to be conveyed upon completion and acceptance of the building.

There was no valuation placed upon the lots agreed to be conveyed, and no value or cost of the building so as to be erected, named in the contract.

Tansey, and all persons who furnished labor and materials as sub-contractors in the erection of the building, and who had not been paid, and who claimed anything therefor, either under the statute relating to mechanic's liens, or otherwise, were made parties defendant to the bill, and most of them, including Tansey, answered, and some of them filed cross-bills.

The cause was referred to a master in chancery, who found and reported that twelve of said defendants furnished under contracts entered into between themselves, severally, and said Tansey, certain labor and materials, and that there remained due to them therefor several sums, exceeding, in the aggregate, the sum of \$4,500.

The master also found that "the building to be erected under said contract could not be built by any contractor, allowing him a reasonable profit, for less than about \$8,500;" that the four lots which Tansey had agreed to take did not exceed in value the sum of \$1,200; that the appellant paid out to sub-contractors and to Tansey the sum of \$3,862.45; and the master, upon the theory and finding by him that appellant, the owner, and Tansey, the contractor,

had fraudulently and for the purpose of defrauding sub-contractors, fixed an unreasonably low price in their original contract for the erection of said building, within the provisions of section 29 of the mechanic's lien act, found and reported that the appellant should pay to the respective defendants, severally, their proportionate share of the difference between the sum of \$8,550, which he had as above found to be the cost value of the building, and the sum of \$3,862.45, paid by him on account thereof, and recommended that in default thereof the premises of the appellant upon which the building had been erected should be sold to satisfy the same.

The decree of the court followed the master's report in substance, and so much of it as is pertinent to and explanatory of the main issue involved, is as follows:

"That said Samuel B. Foster and Thomas D. Tansey must have been aware at the time the contract was entered into between them that the building could not be constructed without a loss to the sub-contractors of from \$3,000 to \$5,000, and the court finds that the case made out by the defendants against said Foster and Tansey in this cause comes within the provisions of section twenty-nine (29), of chapter eighty-two (82), on mechanic's liens, wherein it is provided that if it shall appear to the court that the owner and contractor fraudulently, for the purpose of defrauding sub-contractors, fixed an unreasonably low price to their original contract for the erection or repairing of such building, then the court shall ascertain how much of a difference exists between a fair price for the labor and material used in said building or other improvement, and the sum named in said original contract, and said difference shall be considered as a part of the contract, and shall be subject to lien.

And the court finds that a fair price for the construction of the building aforesaid, at the date of the construction thereof was eight thousand five hundred dollars (\$8,500) in money; that complainant has paid out on said building the sum of three thousand eight hundred and sixty-two dollars and forty-five cents (\$3,862.45) leaving a balance of four

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thousand six hundred and thirty-seven dollars and fifty-five cents (\$4,637.55) which should have been paid over by complainant on the date of the filing of the bill herein, and which equitably should bear interest from the date of the master's report herein at the legal rate.

And the court further finds that although certain lots are mentioned in said contract to be paid for the erection of said building, that the complainant is estopped, as against the sub-contractors herein, by reason of the fraud aforesaid, and as set out in the master's report, from claiming the right to have the said lots applied toward the payment of claims made herein. That said lots were worth, at the making of said contract, not to exceed \$1,200, and said Foster is estopped to deny that the contract price is payable in money; and the court therefore finds that enough of said balance of \$4,637.55, with interest, should be divided among the several parties hereinafter adjudged to be entitled to share therein."

The decree then proceeds to apportion among the several defendants their respective shares of said balance, and to adjudge to them, respectively, liens upon the premises upon which the building was erected, and to order a sale thereof, if the said balance is not paid by appellant or said Tansey, within a time named.

We omit discussion of the fact that is not disputed, that the largest part of the claims decreed to be liens were never protected by the service of the notice required by the statute, in the assurance that when it becomes important, as it will, to such of the defendants as have served requisite notices, to see that proper attention of the master and court is called to the statutes and decisions upon that subject, as against the other defendants, it will be done.

A bill of this kind is not an appeal to the conscience of the court to do equity, but is a method to ascertain and dispose of purely statutory liens. Under section 39, it is only persons having liens under other provisions of the mechanic's lien statute, that a decree in favor of can be rendered.

Whether in case of a surplus remaining due from the

owner to the contractor, after satisfying all persons having liens, the court, under a bill like the present one, would distribute it upon equitable principles among such persons as were equitably entitled to it, as against the original contractor, is a question not before us.

A discussion bearing upon that question is in *Newhall v. Kerstens*, 70 Ill. 156, which was a bill, in the nature of a bill of interpleader, filed before section 39 was enacted.

Aside from what seems to be a fatal objection to the decree in that it gives liens, and orders a sale of the premises, in favor of persons who are not statutory lienors, the important question is, was such a case of fraud between the owner and the original contractor made out as is contemplated by section 29, referred to in the decree?

The decree is that respect follows the master's findings, and we are required to look to the master's report to ascertain what facts were proved to justify such findings.

On pure questions of fact the report of a master, where the evidence is voluminous and contradictory, carries much of the weight and conclusiveness rightfully attached to the verdict of a jury.

But whether fraud follows from a state of facts is necessarily a mixed question of law and fact.

The fraud that is provided against by section 29 is that which has its inception between the owner and the original contractor for the ultimate purpose of wrong to the sub-contractor.

In all the legislation that has been had for the purpose of giving a lien to mechanics and materialmen, it has never been undertaken to provide that the owner and contractor may not contract upon such terms as they may agree to, provided only that they shall not fraudulently combine for the purpose of defrauding sub-contractors, by fixing an unreasonably low price for the building.

It is always the privilege of any party who contemplates furnishing material to an original contractor to inform himself about the terms of the original contract, and if not satisfied with it to refuse to sell to the contractor. To such as

do not, the mechanic's lien statute is a "delusion and a snare." Goodman v. Fried, 55 Ill. App. 362.

"It is the law that the right of a sub-contractor to a lien depends upon" the contract of the original contractor. *Julin v. R. P. M. Co.*, 54 Ill. 460; *Phillips on Mechanics' Liens*, Sec. 62.

"The allowance of any lien at all to a sub-contractor is a special privilege, * * * and it is not unreasonable to require him to look to the principal contract to ascertain whether it is such as to justify him in becoming a contractor under it." *Phillips on Mechanics' Liens*, Sec. 58.

Some of the sub-contracting defendants did take at least some steps to become informed of the original contract, and others did not. Whether with or without information of its terms, the several defendants did enter into sub-contracts with Tansey under which they furnished the materials and labor for which they have been decreed liens.

Now, unless there was such fraud committed as is contemplated by the statute, they are confined to the terms of the original contract, and are not entitled to the relief given by the decree.

The provisions of section 29, relating to the fraudulent combination of the owner and original contractor, are sufficiently set out in that portion of the decree above copied.

The decree, following the language of the master's report, finds that appellant and Tansey "must have been aware at the time the contract was entered into between them that the building could not be constructed without a loss to the sub-contractors of from \$3,000 to \$5,000, and such finding is the only one of fraud that the decree makes in support of its conclusion that, therefore, the provisions of section 29 are applicable.

The finding that appellant and Tansey "must have been aware" that a loss of from \$3,000 to \$5,000, would ensue to sub-contractors, has for its only support the other fact found by the master, that the four lots which Tansey was to accept in part payment, were worth only \$1,200.

Had those lots been worth \$4,000, or upward, there is

no pretense that "an unreasonably low price" for the building would have been fixed.

What was the belief of the owner and contractor as to the value of the lots?

The appellant testified that he considered them worth from \$4,400, upward. Tansey testified that before entering into the contract he went and looked at the lots, and that he was told by the town assessor that they were worth \$1,000 each, and that he signed the contract after making such investigation. It is not questioned but that appellant owned the lots, nor but that his conveyance of them to Tansey by warranty deed, as he contracted to do, would have vested a good title in Tansey.

The lots appear to be located about eight miles in a westerly direction from the business center of the city of Chicago, and that witnesses should have testified that they were worth only \$1,200, when, in the estimate of others, they were worth \$4,000, or more, is but the corroboration of an every-day observation in the matter of placing valuations upon real estate in the large and growing city of Chicago, and a court should be slow to find that a mere over-valuation of the lots by the parties to the contract, was sufficient, in itself, to establish the fraud contemplated by the statute in question. A mistaken opinion under such circumstances is not equivalent to fraud.

Tansey testified that at the time of signing the contract he had between \$2,200 and \$2,300 in cash on hand, and that he thought the building would cost inside of \$6,000.

The appellant was a practicing lawyer, and there is no evidence that he had experience in building that would qualify him to estimate, with much accuracy, the cost of the proposed building, but he testified that he placed its value at \$6,500 or \$7,000; and it appears that a building, after which the building in question was copied, cost \$7,400 or \$7,600. And both the appellant and Tansey deny that there was any preconceived plan on their part to defraud anybody.

The fraud against sub-contractors that will justify what

was decreed by the court below is in fixing an unreasonably low contract price for the building by the owner and contractor.

The master's report, which formed the basis for the decree, evidently was made upon the theory that fraud practiced at any time upon the sub-contractors by the appellant, was sufficient to bring the case within the provisions of section 29 of the statute.

Upon the subject of what fraud was practiced, aside from the value of the four lots, the principal brief for appellees on the subject of fraud, summarizes as follows, and we will presume makes as favorable a statement for appellees as a reasonably fair comment upon the evidence would warrant, viz :

"The testimony shows that Tansey was a semi-worthless, drunken sort of a character, who had done various work for Foster in the past, and who lived down on Justin street in the town of Lake. Foster industriously circulated false reports of Tansey's financial standing. He told Dressel that Tansey was rich; told Stripleman that Tansey was honest and had property; told Switzer that Tansey had property down on Justin avenue in his own name and was worth \$18,000. The record shows that the property on Justin avenue was conveyed by Foster to Tansey's wife in 1889, for a consideration of \$2,500, and that the property was not worth over \$2,500. Foster told Evans that Tansey had a fine place down where he lived, and was worth \$15,000. Whenever any sub-contractor went to Foster, asking him about payments, Foster invariably told him that he would protect him, and led them to believe that there were moneys coming to Tansey upon the contract. The evidence shows that Foster paid out over \$800 over the \$3,000 in cash, and now says that he did it through an oversight. A simple examination of the record will show that Mr. Foster used great care in getting contractor's statements and great caution in making payments—those which he did make—and it is impossible of belief that Mr. Foster would pay out nearly \$1,000 over the amount specified in

the contract and be insensible and unconscious of such over-payment. The only consistent conclusion to draw from such over-payment is that Foster knew that if he quit paying out at the \$3,000 mark, that the materialmen would quit delivering and that his building would stop where the loss would mainly fall on him. On February 18th, the evidence shows that he paid out \$2,870, and on February 29, 1892, he paid \$400, running over by that payment the \$3,000 limit. The building was not completed until after May 1st. Every conversation which Foster ever had with any of the sub-contractors was a conversation calculated to lull them to sleep and make them believe that they would receive their money for the material furnished by them."

The issue presented is whether there was fraud between the owner and the contractor, within the statute, and not whether appellant made fraudulent representations concerning Tansey, after the latter had made sub-contracts with the appellees, nor whether appellant had estopped himself from denying his liability to appellees by undertakings on his part to pay them for what they had contracted to do for Tansey.

We do not regard the record as containing sufficient proof of facts and circumstances to warrant the decree that there was such fraud between appellant and Tansey in fixing the contract price as to call for the interposition of the provisions of section 29, upon the subject of fraud.

Such a variety of questions may arise between the appellant and the several defendants, and between such defendants themselves, concerning the matter of whether liens have been saved by due compliance with the statute by all or either of the defendants, and in other respects which we will not attempt to enumerate, and which have been unimportant upon the record as made, and have therefore not been argued fully, that we refrain from expressing any directions concerning them.

With the main question disposed of that no such fraud has been proved as is contemplated by the statute relied

Florsheim v. Dullaghan.

upon, and that because thereof, the decree must be reversed, and the bill being properly filed, it will be safer to leave to the Circuit Court the determination of the relative rights of the various parties upon a further hearing and consideration thereof.

The motion of appellees Henry and Evans to strike from the record certain documents purporting to be exhibits contained within the certificate of evidence is denied. See *Wolcott v. Lake View Building and L. Association*, 59 Ill. App.

The decree of the Circuit Court is reversed and the cause remanded.

Simon Florsheim v. John Dullaghan and James Dullaghan.

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1. **DAMAGES**—*When Less than the Evidence Requires.*—The fact that the damages are less than the evidence shows, can be complained of only by the plaintiff in the action.

2. **RESPONDEAT SUPERIOR**—*Application of the Rule.*—A person can not contract with another to do an act which necessarily involves the doing of an injury to a third person and escape liability under the plea that there is the intervention of an independent contractor.

3. **VERDICTS**—*When Not to be Disturbed.*—Although the court may have a strong suspicion that a verdict upon conflicting testimony is not what it ought to be, it can not set it aside unless it is demonstrated that it is against a very strong preponderance of the whole evidence.

Trespass on the Case, for damage to goods from dust, etc. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

REMY & MANN, attorneys for appellant.

P. O'NEIL BYRNE, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Though we may have a strong suspicion that a verdict of a jury upon conflicting testimony is not what it ought to be,

yet we can not set it aside unless we can demonstrate that it is against a very strong preponderance of the whole evidence. It is useless to recapitulate the evidence in this record to show that we can not disturb the verdict for the appellees.

The case is that the appellees were in possession, lawfully, as we must assume, of one of a row of one-story stores as tenants of the appellant. They were soon to move out. The appellant made a contract with a builder to tear down the buildings and do the mason work for the erection of a seven story row. It is not claimed by the appellees that the contractor disturbed them in the possession of the store they were in, but that in tearing down one adjacent, the effect was to cast dust, mortar and plaster upon delicate goods in their store and seriously injure them.

The contract between the appellant and builder was in writing, and the appellant told the builder to be careful and not to interfere with anybody that occupied any of the buildings.

The appellant claims that the verdict is inconsistent, citing *Cook v. Stearns*, 28 Ill. App. 511. That the damages awarded being much less than the testimony on the part of the appellees, with no testimony for the appellant upon the subject, estimated the injury, indicated that the verdict was a compromise without any agreement by the jury "upon any material question in the case." That argument is effectually answered in *Wolf v. Goodhue Fire Ins. Co.*, 43 Barbour 400; affirmed without an opinion in 41 N. Y. 620.

That the damages are less than the evidence required can be complained of only by the plaintiffs below.

The instructions given to which the appellant's brief directs our attention, were as follows:

First, at the request of the appellees:

"The jury are instructed that if they believe from the evidence that the defendant let a contract to one John Woodstrom, for the pulling down of certain buildings on Wabash avenue, owned by the said defendant, and if they

believe from the evidence that the natural and necessary consequences of the carrying out of said contract according to its terms would be to damage and injure the property of the plaintiffs, which property you may find from the evidence the plaintiffs, at that time, lawfully had in one of said buildings, then and in that case the fact that the defendant let the work by an independent contract can not release him from liability."

And then at the request of the appellant:

"If the jury believe from the evidence that the defendant told Woodstrom, the contractor, that he must not interfere with the building of plaintiffs, and if they further believe from the evidence that the construction of the building occupied by plaintiffs and of the adjoining buildings was such as to permit the adjoining buildings to be torn down without injuring the building occupied by plaintiffs, if such work should be done in a proper and careful manner, then the jury should find a verdict for the defendant."

It is urged that these instructions are inconsistent; that as the contract was to tear down the four buildings, it, in effect, directed a verdict for the appellees.

Had the builder in fact torn down, in whole or in part, the building in which the appellees were, before they moved out, that instruction would, in effect, have directed a verdict for the appellees. But that was not alleged.

The question before the jury under the two instructions was, what the builder did do, necessary under the terms of his contract and was it a damage to the appellees. If so, then the fact "that the defendant let the work by an independent contract" was not a defense.

The appellant's brief admits the general rule of law, saying: "It is not claimed by us that a person can contract with another to do any act which necessarily involves the doing of an injury to a third person and escape liability under the plea that there is the intervention of an independent contractor. But we insist that where the performance of the contract does not necessarily, or with reasonable certainty, involve injury to the third person the rule of *respondent superior* does not apply."

Had the verdict been the other way it would have been difficult to justify an instruction that when the rights of parties are fixed by a contract in writing, a parol direction by one of the parties to the other can have any effect either as to third persons or between themselves.

On the whole case there is no error, and the judgment is affirmed.

Edward F. Angell and Isaac W. Higgs v. Nathan Jewett.

1. **EQUITY JURISDICTION**—*Deeds may be Shown to be Mortgages.*—In a court of equity an absolute deed may be shown to be a mere mortgage, or if not prevented by the statute of frauds, may be shown to have been given only in trust.

2. **SAME—General Powers.**—A court of equity always aims by its decrees and orders to do equity. He who seeks equity must do equity.

3. **TRUSTEES—Can Not Add to the Trust.**—A trustee is not entitled to add to the trust that which neither the donor nor the *cestui que trust* directs or assents to; he can not insist upon holding property intrusted to him, until indebtedness in no way connected with the trust is paid.

Bill to Compel a Reconveyance of Letters Patent.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard at the March term of this court, 1895. Affirmed. Opinion filed May 16, 1895.

STATEMENT OF THE CASE.

This was a bill in chancery to compel the reconveyance of certain United States Letters Patent from the defendants to the complainant. On hearing, the prayer of the bill was allowed.

Four defenses were interposed, viz:

“First. The complainant was without equity, because the patents were conveyed to defendants by him for the purpose of hindering and delaying one of his judgment creditors.

Second. An executed instrument under seal, which recites proper consideration, can not be impeached by showing want of consideration.

Third. The complainant has no standing in court even on his own contention, that the patents were assigned in part execution of contract between the defendants and himself, because the evidence shows that such contract failed of consummation solely through the fault of the complainant.

Fourth. The court in any possible event should have decreed this reconveyance only on equitable terms."

GEO. A. DUPUY, attorney for appellants.

MYRON H. BEACH, attorney for appellee.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

As to the first and third contentions of appellants it is sufficient to say that the Circuit Court found the issues upon the facts for the complainant, and that with such finding we see no reason for interfering.

As to the second contention :

This is a proceeding in a court of equity, wherein absolute deeds may be shown to be mere mortgages, or may be shown, if not prevented by the statute of frauds, to have been given only in trust. The bill is not one to set aside deeds for a mere want of consideration.

As to the fourth contention, it is unquestionably the rule that a court of equity always aims by its decrees and orders to do equity; appellant was and is entitled to have all his equitable rights considered and respected in the decree. He who seeks equity must do equity.

Appellee is indebted to appellants, and they insist that he should be required to pay this as a condition of a re-assignment of the patents. They state that there was no consideration for the assignment of the patents to them; they do not show that upon the strength of such assignments, or because thereof they have done or suffered anything; in other words appellants obtained these patents without consideration at the beginning and so hold now. We do not

regard the mere facts that appellee was owing appellants when these assignments were made, and that such indebtedness is yet unpaid, as giving to them an equitable claim upon these patents, in the face of the undisputed fact that nothing has ever been given, done, suffered or promised by appellants in consequence of the assignment, save the bare placing of the assignments upon record.

A trustee is not entitled to add to the trust that which neither the donor nor the *cestui que trust* directs or assents to; he can not insist upon holding property intrusted to him until indebtedness in no way connected with the trust is paid.

We do not deem it necessary to say anything concerning the proper method of enforcing obedience to the decree of the court below.

The decree of the Circuit Court is affirmed.

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John W. Fitzgerald and Elizabeth M. Fitzgerald v. John Quinn.

1. **FORCIBLE DETAINER—Possession—Not Title Involved.**—The right of possession only, and not the title, is involved in forcible detainer proceedings.

2. **SAME—Appeals.**—There is no issue in an action of forcible entry and detainer as to the title of the premises, and appeals are taken to the Appellate Court.

3. **SAME—Entry upon Vacant and Unoccupied Lands.**—An entry upon vacant and unoccupied lands, without right or title, may be either with or without force of arms in order to constitute a forcible detainer after demand for possession.

4. **SAME—Where the Entry is Peaceable.**—Where the entry is peaceable, it is the detention after demand for possession that is wrongful and tortious.

5. **FORCIBLE ENTRY AND DETAINER—Under the Statute.**—Under the third paragraph of Section 2, Chapter 57, R. S., entitled "Forcible Entry and Detainer," an action may be maintained where an entry is made into vacant or unoccupied lands or tenements without right or title.

Forcible Detainer.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

Fitzgerald v. Quinn.

FRY & MAHER, attorneys for appellants.

MASTERSON & HAFT, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action of forcible detainer to recover possession of a strip of land twenty-six inches in width at the west or front end of a lot numbered 19, and tapering to the width of twenty inches at the east or rear end of said lot.

Said lot 19 appears by a plat attached to the transcript to be one of several lots forming a subdivision in what is now a part of the city of Chicago, and said strip comprises the north side of said lot.

Next to it is lot 20 in the same subdivision. In the Circuit Court the cause was tried upon the following agreed facts:

“The parties to this suit hereby waive a jury and submit this cause to the court to be tried without a jury, upon the following facts agreed upon:

That upon the 21st day of August, A. D. 1883, the plaintiff, John Quinn, obtained a warranty deed to lot 19, block 2, in James Goodspeed's subdivision of 7.88 acres in the northwest quarter of the northeast quarter of section 9, township 38 north, of range 14 east of the 3d principal meridian, in Cook county, Illinois, from Mary A. R. Harrison, formerly Mary Ann Regina McNamara, and her husband, Robert Harrison, of Fergus Falls, Minnesota, which deed is recorded in the recorder's office of Cook county, as document 503,505, on the 24th day of October, 1883, in book 1428 of records, on page 103, which is here offered in evidence and marked 'Plaintiff's Exhibit A,' claiming title by mesne conveyances from the United States Government. That after the time said deed was so received as aforesaid by plaintiff, the defendant Elizabeth M. Fitzgerald, who is the wife of the defendant John W. Fitzgerald, obtained a deed to lot 20, in block 2, claiming title by mesne conveyance from the United States Government,

in the same subdivision, which is immediately north of and adjoining said lot 19. That at the time that said deed was made to the plaintiff, the premises, lot 20, or the greater part thereof, were inclosed and a house built thereon, and the same was surrounded by a fence substantially as set down and delineated upon a certain plat of survey, which is now introduced in evidence, marked Plaintiff's Exhibit B; said south line of said inclosed premises being the most northerly of the red lines marked 'fence' on said plat. That at the time the deed was obtained by the plaintiff, a fence encircled the entire inclosure north of the red line and marked 'fence,' in lot 19 and so much of lot 20 as is included in 25 feet north of said line marked 'fence.' That such fence was on the east and west lines, and also on the north side, and 25 feet north of said line marked 'fence,' the same constituting one entire inclosure. That at the time the deed was obtained by the plaintiff there was upon the premises contained in said inclosure a two-story frame building, which building was then occupied by tenants, and continued to be occupied by tenants of parties other than the plaintiff, until the time of the obtaining of the deed by defendants, upon which date one of the tenants moved out of the second story of said building and the defendants moved into said second story; the defendants having continued to occupy the said building and the premises inclosed within said fence continuously from the date of their deed until the date of the service of process in this case, except as hereinafter stipulated. That south of and adjoining said house, between the house and the south fence, was a 2½ foot wide board walk which extended from the front of said lot to the rear of said lot, and which was being constantly used by the parties in possession of the premises so inclosed. That the plaintiff never in fact was in the actual possession of the premises contained within said inclosure, unless he was in possession by virtue of his said deed, and the improvement of the street front of lot 19, and the payment of the taxes thereon since 1883, A. D. That during all the time from time of the obtain-

Fitzgerald v. Quinn.

ing of said deed by the plaintiff until the date of the commencement of this suit the plaintiff never collected any rents from any of the tenants upon said premises; never leased or attempted to lease the same, but that said premises were leased and the rents therefor collected by persons (other than plaintiff) who held possession of all the premises contained within said inclosure.

That on the 17th of May, 1891, the day before the commencement of this suit, the defendant moved the fence on the south line of said inclosure, bodily toward the north on a line running from a point eight inches north of where it stood on the west line, to the same point where it stood on the east or rear of the lot.

The defendants stipulate for the purpose of this trial only, and not to be used or claimed against them in any other suit, except they shall eventually be found guilty of forcible detainer of the premises in the complaint described in this action, that the north line of lot 19 is the black line running from School street on the west to the alley in the rear, which is the first line north of the north red line marked 'fence' in the plat offered in evidence.

It is further stipulated that lot 19 has never been improved or occupied by plaintiff or his grantors in any way except the street improvements in front, and excepting so much of the same as is described in the complaint as has been fenced in and occupied by the said fence and board walk as hereinbefore stipulated. That said premises were not fenced in by the defendants, but that said fence was there at the time they received the deed to the said lot 20. And that the defendants entered into possession of said premises in a peaceable and quiet manner under the said deed from Taylor to them. The defendants offer in evidence the said deed from Thomas Taylor, Jr., to Elizabeth M. Fitzgerald, recorded in book 2403, at page 354, and make the same a part hereof and mark the same Defendants' Exhibit A. That all of said lot 19 which was south of said fence was at the time plaintiff obtained his deed, what is called open prairie, and has never been fenced or im-

proved in any way, except that the plaintiff has paid for the street improvements in front of said lot 19.

It is hereby stipulated that the summons, the complaint, and the notices, and the returns thereon, may be considered in evidence.

MASTERTON & HAFT,
Plaintiff's Attorneys.
GEORGE C. FRY,
For Defendants."

The question is, mainly, whether forcible detainer will lie.

The action was brought under the third paragraph of Section 2, Chap. 57, Rev. Stat. Ill., entitled "Forcible Entry and Detainer," which reads as follows:

"Sec. 2. The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided. * * *

"Third. When entry is made into vacant or unoccupied lands or tenements without right or title."

It was charged in the complaint:

"That said premises were vacant and unoccupied, and that said John W. Fitzgerald and wife, Elizabeth M., made entry therein without right or title, and now unlawfully withhold the possession thereof from the said John Quinn."

The right of possession only, and not the title, is involved in forcible detainer proceedings. *Thomasson v. Wilson*, 46 Ill. App. 398, and same case, 146 Ill. 384; *Riverside v. Townsend*, 120 Ill. 9, and cases too numerous to cite.

Indeed, it is conceded by the appeal to this court, which otherwise should have been taken to the Supreme Court, that the title to the strip is not involved, and appellants on page 12 of their brief say: "There is no issue in an action of forcible entry and detainer as to the title of the premises."

It appears by the stipulation of the parties that the appellee, Quinn, was the grantee of all of lot 19, by deed dated August 21, 1883, and that the appellant, Elizabeth M. Fitzgerald, was the grantee of all of lot 20, by a deed of a subsequent date, and that they, respectively, claimed title to said lots, severally, by mesne conveyances from the

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United States; that at the time of the conveyance to appellee, the strip, to which the possession is in dispute, was fenced in along with most, if not all, of lot 20, and was covered at least in part by a board walk, which ran along between the fence and a frame building standing upon lot 20; that at the time lot 20 was conveyed to the appellant, Mrs. Fitzgerald, she, in a peaceable manner, entered, and has ever since been in possession, not only of lot 20 but of said strip, except that just before the commencement of this suit she set back said fence a few inches, as stated in the stipulation of facts; that lot 19 has never been improved or occupied except as to said strip being occupied by said fence and walk, but was, when appellee obtained his deed, what is called open prairie, and the said fence was not put up by appellants, but was there when Mrs. Fitzgerald obtained her deed.

The effect of the admissions in the stipulation is, so far at least as this suit is concerned, to admit ownership by each party of the lots conveyed to them severally, and to concede title to each, and to submit the issue of right of possession alone.

In the nature of things, that part of lot 19 which is in the possession of appellee, having never been improved, but always having lain open as prairie land, it became encroached upon by some grantor of appellant, either immediate or remote, to the extent of the strip in question, when the fence and walk were constructed, and such encroachment was an entry upon vacant and unoccupied lands, and if made without right or title, comes directly within the contemplation of the statute.

There is no pretense that appellants ever had any right, except of possession to the strip. Now, lot 19 always having been open and unoccupied, except as to the strip, and no claim of entry by right of title by the appellants, or by any one under whom they claim, being claimed, it seems very clear that their possession to the strip, although taken peaceably, was unlawful, and became a forcible detainer, even though there was no forcible entry by them, just as soon as the demand for possession, and a refusal, were made.

Where no question of title is involved, the entry upon vacant and unoccupied lands without right or title, may be either with or without force of arms, in order to constitute a forcible detainer after demand for possession. It is the detention, after demand, where the entry was peaceable, that is wrongful and tortious, and it seems that the statute was designed for just such a case. *Thomasson v. Wilson*, 46 Ill. App. 398.

We will not discuss the various objections urged by the appellants to the findings of fact and of law by the Circuit Court, where the cause was tried without a jury. The result being right it is not material whether the reasons for it were proper or not.

The question of whether the action of forcible entry and detainer will lie in a case like this, is one of much collateral importance, and should be authoritatively settled, notwithstanding our view is believed by us to be correct. **Affirmed.**

MR. JUSTICE GARY dissents.

William Fitzgerald v. Joseph N. Barker, Trustee, Carrie L. W. Hoops and Charles H. Hoops.

1. **APPELLATE COURT PRACTICE—*Insufficient Abstracts.***—A failure to comply with the rule requiring parties to furnish a complete abstract or abridgment of the record, is a sufficient cause to affirm the decree of the court below.

Assessment of Damages on Dissolution of an Injunction.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in this court at the March term, 1895. **Affirmed.** Opinion filed May 16, 1895.

L. H. BISBEE and W. N. GEMMILL, attorneys for appellant.

BARKER & CHURCH and CLIFFORD & MORE, attorneys for appellees.

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MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

In the brief filed by the appellant, it is asked that the decree of the court below, which, we infer from the briefs, was for damages assessed upon the dissolution of an injunction, be reversed for seven assigned reasons, the first and sixth of which are, respectively, based upon what was alleged and prayed for in the bill, and the defense that was set up in the answer.

The other five reasons are based upon the evidence that was heard. The entire transcript consists of over two hundred and fifty pages, mostly in type-writing.

The bill, and exhibits attached, consist of over thirty, and the answer of thirteen, type-written pages, and the certificate of evidence of nearly two hundred of like written pages.

The abstract that is filed contains nothing of the bill or answer, and does not purport to include anything of the entire transcript except certain oral evidence that is contained on twenty pages, from 67 to 86, of the certificate of evidence.

A large number of affidavits, probably fifty, offered in support of and in opposition to the motion to assess damages, which are in the transcript, are not alluded to in the abstract. The decree, even, is not abstracted.

The first three printed pages of appellant's brief are occupied by a statement of facts concerning the subject-matter of the litigation, but there is no reference to the record whereby the court may verify them, and they are not mentioned in the abstract. In short, the abstract purports only to furnish the oral evidence upon the motion.

The failure to comply with the rule requiring parties to "furnish a complete abstract or abridgment of the record," is urged upon our attention by the appellee, and we are bound to notice it, even though our inclination, if time were abundant, might prompt us to waive it.

The rule is a salutary one, and the more eminent the counsel the greater should be their fidelity in its observance; and from the failure to comply with it in this case it is not

a violent inference that counsel had but little faith in the merits of their appeal.

The great pressure of an already overburdened docket, requires us to decline to do the work of counsel, and to apply the rule, as heretofore. *Mallers v. Crane Elevator Company*, 57 Ill. App. 283, where former decisions are cited. For want of a sufficient abstract the decree is affirmed.

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West Chicago Street Railroad Company v. Herman Loewe.

1. **ADMISSIONS**—*When Pleading may be Taken as.*—A plea in the record, although no evidence is offered under it, may be taken as an admission against the party pleading it.

2. **VERDICTS**—*When Not to be Upheld.*—Verdicts of juries, upon facts, must generally be upheld, but not upon evidence that impresses the court with a suspicion of falsity.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the March term, 1895. Reversed and remanded. Opinion filed May 16, 1895.

EGBERT JAMIESON and VAN VECHTEN VEEDER, attorneys for appellant.

L. M. ACKLEY, attorney for appellee; BRANDT & HOFFMANN, of counsel.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

On the 5th of November, 1891, the appellee received the injuries for which this suit was brought, while alighting from an open grip car on one of the cable lines operated by the appellant in Chicago.

According to his testimony the appellee was thrown, by a sudden stop of the car, from the foot board of the car upon

which he had stationed himself for the purpose of being ready to step to the ground as soon as the car should stop in response to a notice or request that he had given to the conductor of his desire to alight.

He testified that he had never before ridden on a cable car; that when he stepped down on the foot board the car was running at full speed; that suddenly "the gripman stopped the car so quick that it sounded as if the car had struck something. There was a noise as if the car struck something and I went into the air."

The only witness who corroborated the appellee as to how the accident happened was one Lenke. Without going into particulars, it is enough, in this connection, to say that the testimony of the witness presents numerous internal indications of unreliability.

The suit was begun March 16th, and the declaration was filed March 22, 1892. That declaration consisted of three special counts. A year and a half later, and on September 18, 1893, two additional counts to the declaration were filed.

The gist of the negligence charged in each of said five counts was a sudden moving forward of the car, with a jerk or jolt, after having come to a stand, or a suddenly increased speed, with a jerk, after a slacking up, whereby the plaintiff, being about to alight, was thrown.

Two years and a half after the original declaration was filed, and on October 11, 1894, three additional counts to the declaration were filed, and then, for the first time, the gist of the negligence that was charged, was the act that plaintiff, and the witness Lenke, testified to, viz., a sudden checking and lessening of the speed of the car, whereby the plaintiff, being about to alight, was thrown.

The last three additional counts are not merely variant from the first five counts, but are diametrically opposed to them. Now, while the counts were not offered in evidence, they were in the case, and were before the court below on the motion for a new trial, whether the judge looked at them or not; *Haraszethy v. Shandel*, 27 Pac. Rep. 876; and

we are entitled to look at the whole record. They are admissions against the party pleading them. *Robbins v. Butler*, 24 Ill. 387; *Fairbanks v. Badger*, 46 Ill. App. 644, and cases there cited; *Soaps v. Eichberg*, 42 Ill. App. 375.

The witness Lenke, testified that he saw the accident; that he was passing within ten feet of the plaintiff when he was thrown, and although the plaintiff was knocked senseless by his fall and was dreadfully hurt, and lay insensible, he, the witness, passed right on, without saying a word or making an inquiry, or observing whether there were any other passengers, or a conductor, or anybody except the gripman, on the train, yet notwithstanding his indifference and insensibility, making a note, while on the spot, of the day of the week and month, hour and minute, and the number of the car, and said nothing about the case until three weeks later when he met plaintiff's nephew in a saloon, and then heard for the first time who it was that was hurt; that thereafter he talked to no one about the case until "about two months ago," when he talked with plaintiff's attorney, in company with the plaintiff, who he then met for the first time.

The accident happened in November, 1891; the suit was begun in March, 1892; the witness testified at the trial begun on December 13, 1894. "Two months ago" from December 13, 1894, was within two days of the date on which the additional counts, setting up the new cause of injury, were filed. Considering these circumstances, the fact that appellee must have told, and testified that he did tell, his attorney, in March, 1892, how the accident happened, the counts of the declaration then filed setting up the manner of the accident as it then was understood, the effect of such admission in plaintiff's pleadings and the testimony of four or five witnesses for the appellant that the accident happened by the appellee jumping off backward while the car was at full speed, we think there was such a preponderance of evidence in favor of the defense as justifies us in remanding the cause for another trial.

The appellee's present version of the manner of the acci-

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dent must be regarded with a good deal of incredulity, under the circumstances.

Verdicts of juries upon facts must generally be upheld, but not upon evidence that is so suspicious as that of Lenke.

We can not shut our eyes to the situation surrounding us under which witnesses to most important facts make their sudden appearance just on the eve of the trial of personal injury causes. It is not often that their guise is so transparent as in this case.

The judgment is reversed and the cause remanded.

Julius Tesmer v. Joseph L. Boehm.

1. MASTER AND SERVANT—*Notice to Master of Defective Instruments—Where the Rule Does Not Apply.*—The rule that if a servant, who is aware of a defect in the instrument with which he is furnished, notifies the master of such defect, and is induced, by the promise of the latter to remedy it, to remain in the service, he does not thereby assume the risk of such defect until after the master has had a reasonable time to repair it, does not apply to cases where neither the master nor servant contemplate any additional danger to the servant in the use of the defective instrument, but only imperfections in the work done by it.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1895. Reversed and remanded. Opinion filed May 16, 1895.

A. J. ELVIG, attorney for appellant; LYNDEN EVANS, of counsel.

CASE, HOGAN & CASE and ALBERT WAHL, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant is a manufacturer of furniture. The appellee worked for him on a machine called a shaper, which it is unnecessary to describe, but which the appellee in his testimony said is a dangerous machine to work at.

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112	487

He had worked at such machines before. He testified that when he first went to the machine with the appellant, he saw that the top—a table—was cracked, rough, and in bad condition; and told the appellant that if he wanted to turn out good work on the shaper he would have to fix the top; and that the appellant said that he had the lumber for the top in the drying room, that he wanted to put a top on long ago but did not have the time, and that just as soon as he had time, they would have the lumber glued up, and have the new top fixed; that the top would be fixed.

We recognize, and already at this term, *Sendzikowski v. McCormick Har. Mach. Co.*, 58 Ill. App. 418, have acted upon the rule, that "if a servant who is aware of a defect in the instruments with which he is furnished, notifies the master of such defect, and is induced, by the promise of the latter to remedy it, to remain in the service, he does not thereafter assume the risk from such defect until after the master has had a reasonable time to repair it, unless the defect renders the service so imminently dangerous that no prudent person would continue in it;" quoted from *Gowen v. Harley*, 56 Fed. Rep. 975. Even this rule is illogical, though just, when the relative liberty of action of the master and of the servant is considered. But what application has the rule to a case where neither master nor servant contemplated any additional danger to the servant in the use of the defective instrument, but only imperfections in the work done with it, and where the promise is not to remedy the defect within a reasonable time, or generally without any reference to when, but specially, stating that he had wanted to do so long ago, but had not had the time, and would do it at some unmentioned time in the future when he should have time?

Being himself a practical mechanic accustomed to work at a shaper, the appellee knew whether the condition of the top rendered the shaper—a dangerous machine at best—more dangerous, as well, and probably better, than did the appellant; and yet he only spoke of not turning out good work upon it. Both master and servant should have fair treatment and equal justice.

The third principle laid down in *Stafford v. C., B. & Q. R. R.*, 114 Ill. 244, on which we acted in *Legnard v. Lage*, 57 Ill. App. 223, governs this case. There was no promise by the appellant to do any act to render the hazards less dangerous. Neither the appellant nor the appellee had any idea that a new top or table would have that effect. Upon the evidence the court should have granted a new trial.

The defects in the abstract do not touch that point, but generally in making abstracts it would be well to remember Goldsmith's criticism that the picture would have been better painted had the painter taken more pains.

The judgment is reversed and the cause remanded.

58 611
162s 173

Merchants Insurance Company of Newark v. The Union Insurance Company of San Francisco.

1. *INSURANCE—Contracts of Re-insurance by Parol, Valid.*—Re-insurance contracts made by agents are usually, in the first instance, mere parol agreements, afterward reduced to writing, the policy dating back to the time when the risk began. Such parol contracts are valid.

Assumpsit, on a contract of re-insurance. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

STATEMENT OF THE CASE.

About August 2, 1889, Constant Martin, who was the agent for the Merchants Insurance Company at Green Bay, Wisconsin, applied to Mr. Warren, who was the agent of the Union Insurance Company at Green Bay, for a policy of \$2,000 on the steamer "Liberty," owned by Freeman & Kellogg.

Mr. Fred Warren, to whom the application was made, stated that he could not write the policy, but said that perhaps the Union would carry it, and he would write it up

and try them on. He therefore wrote a policy in the Union Insurance Company of \$2,000, and gave the policy to Martin, and Martin, it seems, delivered the policy to Freeman & Kellogg.

When the daily report was received by the general agent of the Union Insurance Company, at Chicago, he immediately wrote to Mr. Warren, declining the risk, and asking him to get the policy up at once. That letter was dated August 8, 1889, and on the next day Mr. Warren went to Martin's office and found there, as he says, J. C. Martin, J. F. Lyons and Constant Martin, and told them that the Union Insurance Company had ordered him to cancel the policy, and to get it up immediately.

Mr. J. F. Lyons, who was the bookkeeper and employed in Martin's office, stated that they would place that risk in the Merchants. Mr. Warren thereupon replied that that would be all right; that all he wanted was to have the policy taken care of, and Martin again replied that they would place it in the Merchants.

Mr. Fred Warren testified that at the time he was there at Martin's office, they told him that they would replace that policy in the Merchants; that they placed it in the Merchants on the morning of his notice to them of the cancellation of the policy, and the arrangement which was there and then made, was that the Merchants Insurance Company would insure that boat in the sum of \$2,000 from that time, and relieve the Union Insurance Company from that risk.

Mr. Warren returned to his office, and on the second day after the conversation, and on Sunday morning, the boat burned. On the next morning after the boat burned, Mr. A. A. Warren, with his son, went to Mr. Martin's office to get the Union's policy. They found Mr. Lyons in the office and asked him whether he had written up the Merchants policy to replace the Union Insurance Company's policy, as he was instructed to do, and he said he had. Mr. Warren then asked Mr. Lyons to see the Merchants register, and Mr. Lyons took it down and laid it on the desk, and Mr.

Martin opened it and found that on the day that the talk was had with Mr. Fred Warren, there was recorded the policy on the boat "Liberty" in the Merchants Insurance Company.

Mr. Lyons said that they had written up the policy and it had been regularly reported to the company all right and straight before the fire; that he had written up on Saturday before the boat burned. The testimony further shows that both Mr. Lyons and J. C. Martin accepted risks and wrote policies of insurance in the Merchants Insurance Company, and that had been their custom for years, and that Constant Martin was in the office but little of the time.

It is a part of the record of this case, that immediately before the trial in the court below, the plaintiff served notice upon the defendant and its attorneys, to produce in court the Merchants policy that had been written up, and also to produce the Merchants register from its Green Bay agency, and also to produce the telegram which the Merchants general agent in Chicago sent to Martin on Tuesday, after the fire; the evidence disclosed that all of those documents were in the hands and under the control of the Merchants Insurance Company at the time of the trial, yet it refused to produce any of them. After the fire occurred, the insurance company sent its representative to Green Bay and paid to Freeman & Kellogg \$1,900, and took from Freeman & Kellogg a written assignment of all claims which they then had or held against the Merchants Insurance Company under the Merchants policy of insurance, and after taking this assignment, the Union Insurance Company made a proof of loss, and inclosed the proof of loss made by Freeman & Kellogg, together with its own proof, to the Merchants Insurance Company, which latter company at once denied all liability and refused to recognize any claim whatever, and thereupon this suit was brought.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellant.

BATES & HARDING, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

There is no doubt that the appellant, by its agents, made an agreement with appellee which was virtually, when made, one of re-insurance, although it was contemplated that a policy should be issued to the owner of the property, and appellee thereby be enabled to get up its policy and be relieved of all liability.

Had the understanding of the respective agents of appellant and appellee been fully carried out before the burning of the boat, the policy issued by the Merchants would have been given to Freeman & Kellogg, the owners, and the policy before issued by the Union surrendered; this, between the agents, it was understood was to be done. Each knew that some days must elapse ere this could be effected, and each recognized that until this was done the agreement of the Merchants was really for the benefit of the Union.

Re-insurance contracts are made almost daily by agents in places of importance; they, like direct contracts, are usually in the first instance mere parol agreements, afterward reduced to writing; the policy being dated back to the time when the risk began. Such parol contracts are valid. *Hartford Insurance Co. v. Parish*, 73 Ill. 166.

We see no reason for thinking that this contract, about which there was nothing unusual, was not one which the agent of the Merchants had power to make. Nor do we think that it can be successfully contended that Mr. Warren had not authority from Freeman & Kellogg to procure insurance in the Merchants.

There is nothing to show that these owners had done more than to authorize him to procure insurance for them, leaving it to him to select the insurer, as to which see *Dibble v. Northern Ins. Co.*, 70 Mich. 1.

The judgment of the Circuit Court is affirmed.

Oliver v. Gerstle.

Thomas T. Oliver v. Albert M. Gerstle.

1. **SHORT CAUSE CALENDAR**—*Notice upon the Adverse Party—Inattention.*—Where an attorney for the plaintiff in an appeal from a justice of the peace served a notice on the defendant in person (no attorney having appeared), and he threw the notice aside without examination or giving his actual attorney any notice of the matter, afterward, upon his motion to set aside the judgment entered, it was held that he was guilty of inexcusable negligence and inattention.

2. **SAME**—*Objections to Mode Where Notice is Given.*—The act approved June 1, 1889, commonly known as the "short cause calendar act," does not specify of what ten days' notice shall be given, but where notice is given, if the adverse party has any objection to the suit going upon such calendar, he must appear and make his objections known.

3. **GUARANTY**—*Not Protected as an Indorsement.*—A guaranty of a promissory note is not protected by either the statute concerning negotiable instruments nor by the principles of the law merchant.

Motion to Vacate Judgment.—Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

S. H. McLAUGHLIN, attorney for appellant.

GEORGE W. BROWN, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

November 2, 1894, a transcript from a justice was filed in the Circuit Court, on an appeal taken by filing a bond there October 29, 1894, from a judgment against the appellant as guarantor upon a promissory note.

November 12, 1894, the attorney of the appellee caused to be delivered to the appellant a copy of a paper containing the following:

"STATE OF ILLINOIS, } ss. In the Circuit Court of Cook
Cook County. }

ALBERT M. GERSTLE }
vs. } Assumpsit.
T. T. OLIVER. }

George W. Brown, being first duly sworn, deposes and

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says that he is the attorney for the plaintiff in the above entitled suit at law, now pending in said court, and that he verily believes the trial of said suit will not occupy more than one hour's time.

GEORGE W. BROWN.

Subscribed and sworn to before me this 12th day of November, A. D. 1894.

JAMES S. KNOWLSON,
Notary Public."

[SEAL.]

"STATE OF ILLINOIS, } ss. In the Circuit Court of Cook
Cook County. } County.

ALBERT M. GERSTLE, }
vs. } Assumpsit.
T. T. OLIVER. }

To T. T. Oliver, defendant: Take notice, that on the 12th day of November, A. D. 1894, an affidavit, of which the foregoing is a copy, was duly filed in said suit, and that the clerk of said court will place said suit on the short cause calendar for trial as by statute provided.

GEORGE W. BROWN.

Dated, Chicago, November 12th, 1894."

It was not true, as stated in the notice, that the affidavit was filed November 12th; both affidavit and notice were filed the next day.

No attorney had appeared in the Circuit Court for the appellant, and he threw the papers aside without examination and gave to his actual attorney no notice of it.

After judgment had been taken he moved to set it aside upon the ground that the case was improperly put upon the short cause calendar, and also for merits.

The statute "short cause calendar" approved June 1, 1889, is blind; does not say of what "ten days' previous notice" shall be given; but here was notice enough that the suit was going upon that calendar, and if the appellant had any objection he should not have disregarded the notice, but made his objection known. Johnston v. Brown, 51 Ill. App. 549.

On the merits, the case is, that one Scanlan had given his note, guaranteed by the appellant, to one Tuttle for \$200,

Moore v. Parish.

payable in sixty days, as the price of a privilege or option to buy some stock within sixty days, both the stock and note being put into the hands of a stockholder to be delivered to Tuttle if Scanlan did not buy; and as he did not buy, they were so delivered.

Whether it makes any difference whether the indorsement by Tuttle to the appellee was before or after maturity we leave undecided, only remarking that a guaranty is not protected by either the statute concerning negotiable instruments, nor by the principles of the law merchant.

It may be true that the appellant had a good defense, on the ground that Tuttle deceived Scanlan as to the stock. Certainly he had under section 130 of the Criminal Code, which has been applied to many cases within its letter, though not within the mischief intended to be prevented by it. *Locke v. Fowler*, 41 Ill. App. 66.

But we may not say that the court erred in refusing to relieve the appellant from the consequences of his inexcusable negligence and inattention. *Hinckley v. Dean*, 104 Ill. 630.

There is, unavoidably, great delay in the administration of justice in this county, however diligent courts and counsel may be, owing to the press of business, and there should be strong reasons for permitting a party to increase that delay by indulgence to him.

The judgment is affirmed.

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163s	93

Anton Moore v. Carrie I. Parish et al.

1. **MECHANIC'S LIENS**—*Statement Under Section 4*.—A general statement of the gross amount or balance due for work and material furnished under a contract for the erection of a building during a named period, is not a compliance with Section 4, Chapter 82, R. S., entitled "Liens."

Mechanic's Lien.—Work and material. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard at this court in the March term, 1895. Affirmed. Opinion filed May 16, 1895.

JAMES C. McSHANE, attorney for appellant.

APPELLEES' BRIEF, ASHCRAFT, GORDEN & COX, ATTORNEYS.

Appellees contended that the statement is void for want of dates and items. *Rush v. Able*, 90 Pa. St. 153; *Bayer v. Reeside*, 14 Pa. St. 167; *McClintock v. Rush*, 63 Pa. St. 203; *Johnson v. Gold*, 32 Minn. 535; *McDonald v. Rosengarten*, 35 Ill. App. 71; *Campbell v. Jacobson*, 46 Ill. App. 287, 289; *McDonald v. Rosengarten*, 134 Ill. 126, 130; *Campbell v. Jacobson*, 145 Ill. 389; *Phillips on Mechanic's Liens*, Sec. 359; *Valentine v. Rawson*, 57 Ia. 179; *Holtschneider v. Page*, 51 Mo. App. 285.

The lien notice is bad, because it does not state what part or portion is for work or what part for materials. *Shackelford v. Beck*, 80 Va. 573; *Greene v. Ely*, 2 G. Gr. (Ia.) 508; *Valentine v. Rawson*, 57 Ia. 179.

A statement of balance due is not sufficient. *Graves v. Peirce*, 53 Mo. 423; *McWilliams v. Allan*, 45 Mo. 573; *Burrough v. White*, 18 Mo. App. 229; *Foster v. Wulfig*, 20 Mo. App. 85; *Lewis v. Cutter*, 6 Mo. App. 54; *Rude v. Mitchell*, 97 Mo. 365; *Coe v. Ritter*, 86 Mo. 277.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

A stipulation as to interests of third persons now in this record, takes the case out of the reason on which it was decided when here before. 50 Ill. App. 233. And the Supreme Court have since decided that the reason was bad. *Campbell v. Jacobson*, 145 Ill. 387; *McIntosh v. Schroeder*, 39 N. E. Rep. 478.

The attempt by the appellant to comply with section 4 of the act as to liens, in "setting forth the terms when such material was furnished or labor performed," was by a verification of an account as follows:

"CHICAGO, Ill., March 24, 1891.

James A. Parish to Anton Moore, Dr.:

To balance due for carpenter work and material for same, furnished under contract during a period commencing May 1, 1890, and ending about January 15, 1891, \$3,753."

Walsh v. Hettinger.

The only information that account gave was that Moore claimed from Parish a balance for work and material—how much of either not shown—furnished during a period of about eight months and a half. Such an account is not a compliance with Sec. 4. There is no decision quite in point, but the language used in deciding *McDonald v. Rosengarten*, 35 Ill. App. 71, 134 Ill. 126, and *Campbell v. Jacobson*, 46 Ill. App. 287, 145 Ill. 389, applies.

The decree dismissing the petition must be affirmed.

James Walsh v. John P. Hettinger.

1. **SHORT CAUSE CALENDAR**—*Discretion of the Court.*—Much discretion is reposed in the trial judge as to what he will do in respect to allowing causes to remain upon, be tried on, or stricken off, of the short cause calendar.

2. **STATEMENT OF ACCOUNT**—*Binding upon the Parties.*—Where a person renders to another a bill of his account against him for services rendered, he will, upon an action brought for the same, be confined in his recovery to the amount of the bill rendered, unless he can satisfactorily show that the bill rendered is not correct.

Assumpsit, for the services of an architect. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1895. Remittitur ordered. Reversed and remanded. Opinion filed May 16, 1895.

STATEMENT OF THE CASE.

This was an action by an architect to recover for the making of plans, specifications, sketches and drawings.

The plaintiff claimed the sum of \$1,102, for which sum he had rendered an itemized bill.

The *ad damnum* of the plaintiff's declaration was in the sum of \$1,200; the declaration, as first filed, contained one special count and the common counts. To this the defendant filed a plea of general issue. Afterward the plaintiff obtained leave and filed another special count, to which the defendant interposed the general issue, a plea of the statute

of frauds and notice of a set-off to the amount of \$2,500, by reason of damages claimed to have been suffered by appellant on account of the neglect and mismanagement of the plaintiff in respect to the construction and superintendence of a certain building mentioned in the plaintiff's declaration.

A demurrer to the special plea of the defendant to the amended declaration was sustained.

On the 25th day of October, 1895, the plaintiff's attorney, for the purpose of having the cause placed upon the short cause calendar, made and filed an affidavit that he verily believed that the trial of said cause would not occupy more than one hour's time. On the 5th day of November, the plaintiff filed the additional count heretofore mentioned, and by agreement the cause was continued on the short cause calendar for one week, without prejudice.

On the 10th day of November, the plaintiff demurred to the special plea heretofore mentioned, and on the 17th day of November such demurrer was sustained.

On the 20th day of November the defendant moved to strike the cause from the short cause calendar, because the cause was not then at issue, which motion the court overruled.

On the 26th day of November, the cause was called for trial on the short cause calendar.

The oral testimony given upon the trial occupies sixty typewritten pages of the record. Plans and sketches of proposed buildings were introduced in evidence upon the hearing; also a bill rendered by the plaintiff to the defendant, dated June 1, 1894, for \$485; and another itemized bill for \$1,102 the latest date of any item, upon which is "May, 1893."

The jury returned a verdict and there was judgment for the plaintiff for \$800.

Defendant's counsel called, during the presentation of plaintiff's case, the attention of the court to the fact that the case had already occupied more than an hour, and asked that it be stricken from the short cause calendar, which the court refused to do.

Walsh v. Hettinger.

O'DONNELL & COGHLAN, attorneys for appellant.

WARWICK A. SHAW, attorney for appellee.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Great complaint is made by appellant that he was prejudiced by the conduct of the court in, as he says, so hurrying the trial of the cause that he was unable to examine the exhibits introduced by plaintiff, or properly present his own case; and it is strenuously urged that this cause ought not to have been placed or tried upon the short cause calendar.

As we have before said, much discretion is reposed in the trial judge as to what he will do in respect to allowing causes to remain upon, be tried on or stricken off the short cause calendar. We do not think, as we examine the record of this cause, it to have been one that ought ever to have been placed on the short cause calendar. It was not a mere collection case. The declaration contained two special counts, as well as the common counts. An offer of compromise had been rejected, and it is apparent that it was a fighting case. It is very seldom that an action for disputed services, such as plaintiff claims to have rendered, where the defendant disputes the entire bill, can be tried in one hour.

The motion of the defendant, made November 20th, to strike the cause from the short cause calendar, was placed upon the ground, solely, that the cause was not then at issue; the court does not appear to have been then informed of what the pleadings were or the nature of the litigation.

We perceive no error in its action upon that motion. Nor are we willing to say that it erred in not continuing the cause upon the trial.

We are not, however, able to affirm the judgment in this case for \$800, in the face of the fact of the rendering, June 1, 1894, by the plaintiff to the defendant, of a bill for \$485. No satisfactory explanation of the change of appellee's claim from \$485 to \$1,102 has been made. The judgment

of the Circuit Court will be reversed, and the cause remanded, unless the plaintiff shall, within ten days, remit \$315 from his judgment.

In any event, appellant will recover his costs in this court. Reversed and remanded, unless remittitur in ten days.

Bernhard Fried, Frank Compton, Eva Compton, Frank R. Chandler, Trustee, George W. Cass, Trustee, and the Holders of the Notes Secured by Trust Deeds to said Trustees, v. William Blanchard and Tim B. Blanchard, Partners, as T. B. Blanchard & Co.

1. **MECHANICS' LIENS**—*Material for Separate Buildings in Gross*.—A materialman can have no lien for lumber furnished for erecting six separate buildings on different lots under a contract in gross for the whole, no account being kept of the lumber that went into any separate building.

2. **SAME**—*Separate Buildings on One Tract*.—A lien for material furnished for the erection of separate houses on the same tract of land may be enforced, and the fact that after the making of the contract for such material the tract of land is subdivided so as to locate each house upon a separate lot does not affect the lien.

3. **SAME**—*Statement Under Section 4*.—The statement required by Section 4, of Chapter 82, R. S., entitled "Liens," must specify the dates upon which the materials were furnished, without which there can be no lien.

4. **SAME**—*Statement—Dates—Presumption as to*.—Where a statement of materials furnished contains no date except the one date at the head of the statement the presumption is that such date is that of the making of the statement and not that of the furnishing of the materials.

Mechanics' Liens.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1895. Reversed and remanded. Opinion filed April 16, 1895.

STILLMAN & MARTYN, attorneys for appellants.

NORTON, BURLEY & HOWELL, attorneys for appellees.

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Fried v. Blanchard.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

In *Goodman v. Fried*, 55 Ill. App. 362, we held that Goodman had no lien for the plumbing of six separate cottages on different lots, under a contract in gross for the whole six.

Here the Blanchards claim a lien upon the same property for the lumber furnished for the same houses under an order as follows:

“CHICAGO, Ill., Apr. 1, '92.

MESSES. T. B. BLANCHARD & Co.

Gentlemen: Please deliver to Mr. F. Remus such lumber as he may need to build my six houses on Greenleaf and Ashbury Aves., South Evanston, and charge the same to my account, and oblige,

Yours truly,

BERNHARD FRIED.”

When the order was given and the delivery of the lumber began, the ground was on the record shown as lot 1, block 7, Pitner's addition to Evanston. Before Goodman's contract, the lot had been subdivided and the plat recorded. Before plumbing can go into a house it must be partly constructed, and therefore its location is fixed. The delivery of lumber may begin before the location is determined.

No separate account was kept of the lumber that went into each house, nor does the record show whether more went into some than into others. As the delivery of the lumber began April 11th, the acceptance of the order by Fried dated April 1st, must have been on one of, or between those days, and such acceptance constituted a contract under which a lien, if there be a lien, attached from the time that the contract was made. *Paddock v. Stout*, 121 Ill. 571. Though it is the performance that furnishes the “rich oriental perfume,” of which Breese, J., speaks in 23 Ill. 634.

Now if, with lot 1, block 7 unsubdivided, the order had been for lumber to build “my house” instead of “my six houses,” then the lien would have attached to the whole lot, and *St. Louis Nat. Stock Y'ds v. O'Reilly*, 85 Ill. 546, seems to prove that more than one house does not affect the lien. *Berndt v. Armknecht*, 50 Ill. App. 467. The

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appellees were therefore entitled to a lien so far as the contract and performance of it were concerned. But the cases of McDonald v. Rosengarten, 134 Ill. 126, Campbell v. Jacobson, 145 Ill. 389, and McIntosh v. Schroeder, 39 N. E. Rep. 478, settle that the statement filed under Sec. 4 of the lien act, must show "the times when the material was furnished," or there is no lien, even against the owner. Bradley v. Pearson Lumber Co., 58 Ill. App. 417.

Here the statement filed, and the truth of which is sworn to, is as follows:

..... Lumber, Building Paper, Shingles, Lath, etc.	EVANSTON, ILL., Sept. 1, 1892. Mr. Bernhard Fried, Ashbury Ave. & Greenleaf S. Bought of T. B. Blanchard & Co., Office and Yard, Railroad Track, north of Depot.
---	---

	Feet.	Pieces.	Size.	Length.	Description.	Price.
Apl. 11, 1610	115	2x6	14		13½ 21-74	

Then follow the other items of the account showing frequent deliveries of material until July 8.

In the margin at considerable intervals in the column headed April (the paper being ruled in columns), are written names of months, May, June and July—and at more frequent intervals, in the column under 11, figures, none higher than 31. No figures are to be found which can be supposed to indicate *Anno Domini*, except the 1892 at the head. This, as the master found, "is clearly the date when the bill was made up, and can not throw any light on the year in which said materials were furnished."

We agree with the appellee's counsel that this objection "is uniquely hypercritical."

I speak now for myself, and not for the court, in saying that the principle on which the mechanic's lien law has been administered in this State has always been wrong; that instead of being construed strictly as in derogation of the common law, it should have been liberally construed, as a law to supply an omission in the common law; that

City of Chicago v. Ferris Wheel Co.

some degree of trust and confidence must be reposed in each other by men in civilized life, and when one under contract with another attaches his property or labor to the property of that other, so that it can not be recalled, he should have a lien for the enhanced value, and therefore, that whoever brings himself within the first or twenty-ninth section of the act should not be cut off from a lien by neglect to comply with other sections, not in terms, or by necessary construction, imposing conditions precedent, unless it be a fair conclusion that such neglect was intentional, or in some way prejudicial to another. But the established law permits no such course, and as the statement gives to one having no other knowledge of the transaction than what could be derived from the statement itself, no information as to what year the lumber was furnished, we must hold it insufficient.

The decree is therefore reversed and the cause remanded with directions to dismiss the petition at the cost of appellees.

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City of Chicago v. The Ferris Wheel Company.

1. CITIES AND VILLAGES—*Exercise Power Through Ordinances.*—In the absence of an ordinance within the terms of which a proposed structure comes, a city can not interfere with its erection.

Bill for Injunction.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

JOHN MAYO PALMER, corporation counsel of Chicago;
RUBENS & MOTT and FRANK SCALES, of counsel.

GREEN, ROBBINS & HONORE, attorneys for appellee; WILLIAM A. VINCENT, of counsel.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
This is an appeal from an interlocutory order granting an injunction restraining the city from interfering with the

erection of the Ferris Wheel, of world-wide notoriety, upon the company's own premises.

Any multiplying of quotations from the city ordinances, with comments upon them, could only serve to show that there is no ordinance, that by any possible construction, can be held to apply to that wheel. The injunction was granted upon the bill only, which negatives all grounds for apprehending any injury to any individual or the public by the erection of the wheel, and avers that the city officials have informed the wheel company that it would not be permitted to erect the wheel, but would be prevented by force.

The only argument for the city is to bring the wheel within the ordinances. It is not contended that if no ordinance applies, the city has the right to interfere.

The order appealed from is affirmed.

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Simon Florsheim v. John Dullaghan and James Dullaghan.

1. *SEALED LEASE—Power to Change by Parol.*—A lease under seal can not be varied by a parol agreement, but if the lease has terminated, the right of the lessee to make an independent oral agreement for the use of the premises for a term less than a year can not be questioned.

2. *QUESTIONS OF FACT—Termination of a Lease.*—Where the fact as to whether a lease has been terminated, depends upon conflicting testimony and is properly submitted to a jury, their verdict is conclusive.

3. *MOTIONS FOR NEW TRIALS—Sufficiency of a Defense Can Not be Raised, When.*—Whether a defense as shown by a plea is good or bad is not a question to be raised upon a motion for a new trial, based upon an alleged want of evidence or error committed during the trial. The matter should be addressed to the court below by a demurrer.

Assumpsit, for rent. Error to the Superior Court of Cook County: the Hon. JAMES HUTCHINSON, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

REMY & MANN, attorneys for plaintiff in error.

It is contended that the rule of law that the terms of a sealed instrument can not be varied by parol, applies to this

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case; citing Chapman v. McGrew, 20 Ill. 101; Lafferty v. Johnson, 17 Ill. App. 545; Witmer v. Ellison, 72 Ill. 302; Lewis v. Fish, 40 Ill. App. 377; Hume Bros. v. Taylor, 63 Ill. 43; Loach v. Farnum, 90 Ill. 368; Barnett v. Barnes, 73 Ill. 216.

P. O'NEIL BYRNE, attorney for defendants in error.

It is contended that the true doctrine on the question of varying a sealed instrument by a parol contract is that a parol executory contract will not be permitted to have that effect, but an executed parol agreement may be shown to defeat a recovery upon an instrument under seal; citing White v. Walker, 31 Ill. 422; Loach v. Farnum, 90 Ill. 368; Cooke v. Murphy, 70 Ill. 99; Dearborn v. Cross, 7 Cow. (N. Y.) 48; 1 Greenl. on Ev. (14th Ed.), Sec. 302, note 1 and 303; Bigelow on Estoppel (5th Ed.), 684, 685; Swanzey v. Moore, 22 Ill. 63; Wheeler v. Frankenthal, 78 Ill. 124; Worrell v. Forsyth, 141 Ill. 30; McKenzie v. Harrison, 120 N. Y. 260; Hastings v. Lovejoy, 140 Mass. 261; Dickinson v. Board, etc., 6 Porter (Ind.) 135.

If the contract in question is a parol contract executed, modifying the lease, or a parol contract for the surrender of it, which is afterward executed, or a substitution of a parol lease for one under seal, it will be valid. Ryan v. Kirshberg, 17 Brad. 132; Nachbour v. Weiner, 34 Ill. App. 237; Turner v. Mantonya, 27 Ill. App. 500; Dills v. Stobie, 81 Ill. 202.

In Baker v. Pratt, 15 Ill. 571, cited in Dills v. Stobie, *supra*, it is said:

"A parol surrender has been held sufficient in Allen v. Jacquish, 21 Wend. 628; Dearborn v. Cross, 7 Cow. 48; McKenzie v. Lexington, 4 Dana, 129; McKenney v. Reeder, 7 Watts, 123."

In Williams v. Vanderbilt, 145 Ill. 238, the cases of Dills v. Stobie and Baker v. Pratt, *supra*, are approved, and the court says:

"An executive agreement to surrender may be operative as a surrender (2 Wood's Land. & Ten., Sec. 494, p. 1169)."

In Allen v. Jacques, 21 Wend. 634, the court, after stating

the general proposition that contracts under seal can not be modified by parol agreement, says :

"The cases of *Lattimore v. Harsen*, 14 Johns. R. 330, and *Dearborn v. Cross*, 7 Cowen 48, are relied on as showing that a specialty may be modified by a simple contract between the parties. If these cases be maintainable, and I think they are, it must be on the ground of a contract for rescission executed and fully carried into effect, not on the simple idea of modification by a parol contract executory; and they were so afterward regarded in the subsequent cases of *Suydam v. Jones*, 10 Wend. 180, *Barnard v. Darling*, 11 Id. 28, and *De La Croix v. Bulkley*, 13 Id. 71."

In 1 *Greenleaf on Evidence*, 302, n.1, cited in the *Worrell* case, it is said :

"But if the obligation be by deed, and there be a parol agreement in discharge of such obligation, if the parol agreement be executed, it is a good discharge."

And the note cites *LeFevre v. LeFevre*, 4 S. & R. 241. Here there was a deed giving the grantee the right to lay water pipes over the land of the grantor. Afterward, while the deed was in force, the route for laying the pipes was changed by oral contract and the contract executed. The court says :

"As to the objection that this evidence was in direct contradiction to the deed, the evidence was not offered for that purpose, but to show a substitution of another spot as being more for the mutual benefit of both parties. If this had not been carried into effect, the evidence would not have been admissible. But where the situation of the parties is altered by acting upon a new agreement, as here, the evidence is proper."

The statute of frauds in this State does not require the surrender of a written lease to be in writing. *Harms v. McCormick*, 30 Ill. App. 125.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit for rent, and the one special

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count of the declaration set up a lease under seal. The lease ran from May 1, 1889, to May 1, 1890.

The defendants admitted the execution of the lease and pleaded a termination thereof by reason of the happening of a fire, whereby, first, they were released by the terms of a fire clause in said lease; and whereby, second, the premises were rendered untenable, and the plaintiff having failed to repair after notice, the defendants were, by the terms of the same fire clause, released.

General and special replications were filed to the pleas; it being replied, specially, that the defendants continued to occupy and enjoy the premises after the happening of the fire, and after the premises became untenable.

Rejoinders were filed by the defendants, upon which issues were joined. The special matter rejoined was, first, that after the happening of the fire, and after the premises became untenable, they, defendants, continued to occupy and use the premises, upon the express understanding and agreement that the plaintiff would repair the premises, which he did not do, and thereby the defendants were released from liability to pay for the use and occupation thereof; and, second, that after the happening of the fire and untenable condition of the premises, and before the lease had, by its terms, expired, the plaintiff requested defendants to vacate the premises, and promised defendants that if they would vacate the premises by a certain named date, he, the plaintiff, would not charge the defendants any rent for the premises from the first day of October, 1893 (1889), until the time the defendants should so vacate, and that defendants did vacate the premises by the time fixed by plaintiff.

To such rejoinders the plaintiff replied, generally, denying the agreement and promise set forth therein.

The cause was tried before a jury who found the issues for the defendants, and judgment was entered accordingly.

The only unpaid rent involved was that which accrued from October 1st until December 24, 1889, at which last date the defendants vacated the premises.

While counsel for plaintiff in error do not waive other errors they confine themselves mainly to a discussion of the issue presented by the alleged promise, set up by the last rejoinder, that if the defendants would vacate the premises by a certain time the plaintiff would charge them no rent after October 1st.

That promise, assuming it to have been proved, rested entirely in parol, and it is contended that the terms of a sealed instrument can not be varied by parol evidence.

The verdict was a general one, finding for the defendants upon all the issues presented by the pleadings.

The evidence disclosed that the defendants paid none of the rent that accrued from October 1, 1889, and that they remained in possession of the premises until the close of December 24, 1889. The premises were known as 217 Wabash avenue, and were a store one story in height. On or about the first of October, in the night time, a fire originated in and substantially destroyed the adjoining store, 215 Wabash avenue, and it is shown by undisputed evidence that the premises in question were involved in the fire; that both the front and rear doors were broken off and that some of the glass was broken, and that a hole about two feet wide and about six feet long was burned and cut, or broken through the roof and ceiling, near the center of the rear part of the store.

In appellant's brief it is said: "It is also not disputed that the roof of the building was damaged by fire * * * so that there was a hole in the same * * * about two by six feet, or perhaps a little longer."

It is not claimed that the plaintiff made any repairs after the fire, although he had notice of it and visited the premises on the morning after it occurred. He testified that he told the defendants he would repair the roof, but that they must first pay him the rent that was due him for the months of September and October and a part of August, and that in October they paid him the August and September rent.

The lease contained a provision that if the lessors should decide to improve the premises the lessees should yield up

possession at any time upon sixty days' notice; and it is not disputed but that about the time of the fire the plaintiff determined to erect a large and permanent building upon the site of the one-story structures, including the store occupied by defendants, and that the parties had one or more conversations upon the subject of defendants yielding possession to plaintiff in the month of December following. The parties differed in their testimony concerning the purport of such conversations and the time of their occurrence, the plaintiff's version being that he promised that if they would move by the 10th of December he would not charge rent for any part of December, and the defendants' version being that plaintiff promised if they would move as early as possible in December he would charge no rent from October 1st.

The two defendants fixed the date of that conversation as having been on or about November 1st, and certainly between the 1st and 10th of November, and the plaintiff fixed it at some time in November, possibly as early as the 1st of November.

We are not concerned with the terms of the conversation so far as it related to the conditions upon which the defendants should vacate the premises, or the time in December when they should vacate, for the verdict of the jury has determined those questions in favor of the defendants' version.

It is material for us, however, to determine the relations of the parties to one another under the sealed lease at the time the conversation was had. If that lease were then in force the competency of an oral agreement to vary its terms would necessarily arise and have to be discussed; if, however, the sealed lease had terminated at or before the conversation was had, no such question is presented, for it can not be questioned but that an independent oral agreement for the use of premises for a term less than a year is valid.

One of the issues presented under the pleadings was whether the premises had been rendered untenable by fire.

The clause in the lease referred to in the pleas as the "fire clause," is as follows:

"In case said premises shall be rendered untenable by fire or other casualty the lessor may, at his option, terminate this lease or repair said premises within thirty days, and failing so to do, or upon the destruction of said premises by fire, the term hereby created shall cease and determine."

There was considerable evidence, mainly undisputed, of the condition of the premises occasioned by the fire, and in which they remained during the continued occupancy thereafter by the defendants, and without reciting it, we think the jury were entirely justified in concluding, as from their verdict we presume they did, that the premises were rendered untenable by the fire, and that the plaintiff failed to repair them within thirty days thereafter.

With that conclusion reached, the other follows from the provision of the lease, above quoted, that the term thereby ceased and determined. The defendants might, nevertheless, waive a termination of the lease, for a failure by plaintiff to repair.

Now, the fire occurred on or about the 1st of October. No witness stated it to have occurred later than October 10th, and the plaintiff testified that it happened some time in October.

The conversation between the parties with reference to defendants' yielding possession, as we have seen, took place between the 1st and the 10th of November, and it is entirely consistent with the proved facts and the finding of the jury, that at the time the conversation was had the term of the lease had ended, and that it was so treated by the parties when they had the conversation.

There was evidence that prior to that conversation all interviews and communications between the parties had reference to repairing the premises, and there is no evidence that thereafter anything was said about repairs.

We regard the evidence as satisfactorily showing that at the time the conversation about removing and a release from rent was had, the term of the lease had ended, and that the parties so treated it. It was, therefore, then competent for the parties to contract together orally with reference to the

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terms upon which a continuation of occupancy should be had and a peaceable surrender be made.

As to what those terms were the verdict of the jury, upon the evidence, is conclusive.

There was, we think, a fair preponderance of the evidence in favor of the defendants that the premises had been rendered untenable by fire, and that plaintiff had failed to repair within thirty days as he had the option to do, and that thereby the term had ended; and that thereafter the defendants occupied in pursuance of a new arrangement between them and the plaintiff.

The verdict has decided what that arrangement was, and we will not disturb it.

The judgment of the Superior Court is therefore affirmed.

MR. JUSTICE GARY.

I concur in the result upon a shorter ground.

The parties got to an issue upon the allegation by the defendants, in a rejoinder to a replication of the plaintiff, that shortly after the fire, and long before the lease would by its terms expire, the plaintiff requested the defendants to vacate, and promised them that if they would vacate by a certain date, he would charge them no rent after October 1, 1893. All the issues were found for the defendants.

Under the old practice, by which each issue was separately found, and so appeared on the record, if all material issues were found for the plaintiff, and one or more immaterial issues found for the defendant, the plaintiff might have judgment *non obstante veredicto*. Tidd's Practice, 575, 921.

But if with some good pleas, all the issues are found for the defendant, no judgment can be entered for the plaintiff because of any bad pleading by the defendant. Hitchcock v. Haight, 2 Gilm. 604.

Whether the defense pleaded was a good defense or not is a question which, never having been propounded to the court below, that court could not have erred upon; and this court is but a court of review.

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Whether the defense is good or not, is not a question on a motion for a ~~new~~ trial based upon alleged want or weight of evidence; or errors committed during the trial. Nothing in the motion questioned the sufficiency of the rejoinder.

The whole argument of the plaintiff, if good, that the matter of the rejoinder was bad, as being an attempt to vary by parol a contract under seal, should have been addressed to the court below on demurrer to that rejoinder, and would be of no avail on this writ of error, if the insufficiency of that rejoinder were—which it is not—assigned for error.

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Travelers' Preferred Accident Association v. John J. Moore.

1. PLEADING—*Special Plea Amounting to the General Issue.*—A special plea which is in effect but the general issue is obnoxious to a special demurrer.

2. SAME—*Defenses Under Special Pleas, When Admissible Under the General Issue.*—Where a defendant files a special plea and the defense set up by it can be shown under the general issue, which is also pleaded, it is not error to sustain a special demurrer to the special plea.

3. PRACTICE—*Evidence, When to Be Offered Under the General Issue.*—Where a defendant pleads both the general issue and a special plea, to which a demurrer is sustained on the ground that it amounts to the general issue, unless he offers evidence of his defense under the general issue and the court rejects the same, he can not avail himself of the point on appeal.

Assumpsit, on a policy of insurance. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

LOUIS SHISSLER, attorney for appellant.

DOOLITTLE, TOLMAN & POLLASKY, attorneys for appellee.

It is contended that there is no reversible error in sustaining a demurrer to a special plea, when such matter could have

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been shown in evidence under the plea of the general issue, and ~~was~~ not offered and excluded on the trial under such plea. *Hankins v. People*, 106 Ill. 628; *Hartford Fire Ins. Co. v. Olcott*, 97 Ill. 439; *Smith v. Peoria Co.*, 59 Ill. 412; *Governor v. Lagow*, 43 Ill. 135; *Jones v. Council Bluffs*, etc., 34 Ill. 313; *Wilson v. King*, 83 Ill. 232.

In such case it must appear that evidence was offered and rejected by the court. *Curtis v. Martin*, 20 Ill. 557.

A plea must be construed most strongly against the pleader. *Dougherty v. Catlett*, 129 Ill. 431; *Woodward v. Paine, Breese* 295.

A demurrer admits only the facts well pleaded; it does not admit the conclusions or inferences which are in the pleading alleged to have arisen therefrom. *Gould's Pleading*, Sec. 4, p. 429; *Coke on Littleton*, 71 b; *People v. Hatch*, 33 Ill. 9 (125-6); *Compher v. People*, 12 Ill. 290; *Fogg v. Blair*, 139 U. S. 118; *Kent v. L. S. Canal Co.*, 144 U. S. 75.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This cause was submitted to the court below without a jury, and resulted in a judgment in favor of appellee for \$420. The suit was to recover upon a policy of insurance against accidental bodily injuries. There was no evidence offered by the appellant, the defendant below. The policy provided for the payment of \$30 per week, for as many weeks, not exceeding 104, as total disability should ensue.

The evidence disclosed that appellee was injured in the left knee, and in other places less seriously, by a fall from a bicycle, on July 25, 1893, and tended to show that he was wholly disabled from attending to his business for a period of fourteen weeks, and the court so found, and gave judgment accordingly.

To the declaration, which consisted of one special count, the defendant (appellant) pleaded the general issue, and also a special plea, setting up a by-law of the appellant, which is as follows:

"Any member who has sustained injuries in the body or

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lower limbs shall remain confined to the house until he shall have fully recovered from such injuries. In case he shall go out of the house before he has recovered, he shall not receive any indemnity from and after the date he shall have gone out of the house," and averring that the injuries sued for occurred to the body and lower limbs of the plaintiff, and that the plaintiff did not remain confined to the house until he had fully recovered, but that he went out of the house, to wit, on the first day of August, 1893.

To such special plea a demurrer was interposed and sustained.

The main contention is that the demurrer to the plea should not have been sustained.

The declaration charged a liability under the terms of the policy, and in no other way, and set forth a copy of the policy wherein it is expressly stated that the appellee was insured "subject to the by-laws," etc.

If the appellant had desired, it could have proved the same defense under the general issue that was tendered by the special plea, but it offered no evidence whatever.

We said, in *Wineman v. Oberne*, 40 Ill. App. 269, "The general issue was on file. On the trial the appellants offered no evidence. Unless the court rejected evidence of the defense pleaded, when offered under the general issue, it is not material whether the special plea was good or bad," and cited the authorities.

Again, we held, in *Richelieu Hotel Co. v. International Military Encampment Co.*, 41 Ill. App. 268, the same way, saying:

"In this case the appellant filed a special plea attacking the consideration. As that defense, if true, was admissible under the general issue, it is no error that a demurrer was sustained to the plea, whether it was good or bad.

Such also, is the doctrine of *Curtis v. Martin*, 20 Ill. 557. Where a special plea is, in effect, but the general issue, it is obnoxious to a special demurrer.

Even admitting * * * that the right is given to the party to plead the defense specially, he should have done so

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without pleading the general issue, in order to have availed himself of an error in the decision of the court sustaining a demurrer to his special plea. He should not incumber the record with two pleas, when one would secure to him every possible advantage. Admitting that the court was technically wrong in sustaining the demurrer, still he has sustained no injury by the decision. * * * What good to him to have two issues of precisely the same character? If there was error, there was no injury; but we are of opinion that there was no error." *Klein v. Currier*, 14 Ill. 237.

Whether the damages were excessive because of the testimony of the appellee that he drove out at different times, beginning within six or eight weeks after the injury, we need not inquire.

The appellant, although it had the right to do so under the general issue, declined or neglected to offer the by-laws in evidence, and it, therefore, is not made to appear in the record, that there was any such by-law as was set up by the special plea.

The judgment of the Circuit Court is affirmed.

Earl B. Spencer, Trustee, v. World's Columbian Exposition.

1. *RECEIVERS—Expenses and Claims of Creditors.*—Where a receiver is appointed to carry on the business of an insolvent company upon the Exposition grounds, the rent or percentage of profits due from the company to the Exposition for the concession, is a part of the expenses which had necessarily to be paid by the receiver in order to be permitted to carry on the business, and should be paid by the receiver out of funds in his hands in preference to creditors.

Receivership.—Appeal from an order directing a receiver to pay certain moneys, etc., entered by the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1895. Opinion filed May 16, 1895.

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WILLITS, CASE & ODELL, attorneys for appellant.

WALKER & EDDY, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court directing the receiver of the New England Clam Bake Company, an Illinois corporation, to pay to the appellee the sum of \$14,493.74, being twenty-five per cent of the amount received by the receiver in the course of conducting the business of said company, under orders of the Circuit Court entered in the cause wherein said receiver was appointed, upon the petition and motion of the appellee, an intervening petitioner in said cause. The appellant is a party defendant in the cause in which the receiver was appointed, and is interested in the fund in the receiver's hands.

The New England Clam Bake Company was the assignee of a contract whereby a restaurant concession was granted by the appellee to one John S. Morris, and from the opening of the Columbian Exposition, until August 8, 1893, carried on the business authorized by such concession, in the Exposition grounds.

On that date the appellant, pursuant to a clause in certain trust deeds executed to him by the said company to secure the bonds of the company, took possession of all the property of the company on the Exposition grounds.

On the next day, August 9th, a creditor's bill was filed by a judgment creditor, against the company, to which the appellant was made a party defendant, and a receiver of the company was appointed, and the appellant was ordered, he not objecting, to deliver up to the receiver the possession of all of said property, without prejudice to his rights.

The receiver was ordered to re-open the restaurant and conduct the business in the manner in which it had theretofore been conducted, and thereupon proceeded to conduct the business, and continued so to do until the Exposition closed.

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The gross receipts by the receiver from said business amounted to \$57,974.95, and twenty-five per cent thereof is \$14,493.74, which is the sum ordered, as aforesaid, to be paid to the appellee.

The material parts, so far as this issue is concerned, of the contract, or concession, granted to Morris, and to which the New England Clam Bake Company succeeded by assignment, are as follows:

“That the said party of the first part (The World's Columbian Exposition), for and in consideration of the promises and agreements of the said party of the second part (John S. Morris) hereinafter set forth, hereby promises and agrees that it will, and it hereby does, set apart for the exclusive use of the party of the second part from the first day of May, 1892, until forty-five (45) days after the close of the World's Columbian Exposition, the following described tract or parcel of land in Jackson Park, in the city of Chicago, Illinois, to wit: (Describing a parcel of land within the Exposition grounds.)

Said party of the first part further promises and agrees that it will permit said party of the second part to erect and maintain on said tract certain buildings, structures and appurtenances, and to use the same for the purposes of this contract, and to charge persons who do not hold a ticket for clam-bake and other food, for admission to said tract, not exceeding ten (10) cents, if, in the opinion of the chief of construction, the same is necessary for the protection of the said party of the second part from crowds or disorder, provided that, if the said holder of an admission ticket only, should, after admission, purchase anything, the said admission fee shall be credited upon the charge for said purchase.

The said party of the first part promises and agrees that it will conduct its water, sewerage and steam, gas and electric light systems to said tract so as to enable said party of the second part to make the necessary connections therewith, and will allow the use of said systems, and of the cold storage system, on the same basis as given to others holding similar rights.

Said party of the first part also promises and agrees that it will permit said party of the second part to conduct on said tract what is known as 'The New England Clam Bake,' and to charge for a clam bake complete, in season, not exceeding one dollar (\$1). (Then follow numerous details concerning the business to be carried on, etc.)

The said party of the first part further promises and agrees that it will permit said party of the second part to post without and within said building such advertising signs relating to his own business as may be approved by the said chief of construction, the said party of the first part.

Said party of the second part, for and in consideration of the promises and agreements hereinbefore set forth, promises and agrees that it will erect and maintain on said tract all buildings and appurtenances, with their equipment, called for by this contract, and supply them with everything necessary for the purpose of carrying out the same. * * *

The said party of the second part promises and agrees that he will erect all said structures, and supply them with everything called for in this contract, and conduct all business herein mentioned at his own expense, and it is understood by and between the parties hereto, that said party of the first part is not to be liable for any indebtedness incurred by said party of the second part, in and about the matters and things herein provided for. * * *

Said party of the second part promises and agrees that he will faithfully account for, and pay over to the said party of the first part twenty-five (25) per cent of all his gross receipts under this contract, settlements to be had and payments to be made each day for the previous day's business at such times as shall be designated by the party of the first part.

Said party of the second part promises and agrees that the method of issuing and selling tickets, and collecting of admissions and tickets, and of arriving at the amount of gross receipts of the said party of the second part hereunder, shall be such as are approved by said party of the first part, which may prescribe the same should it so elect.

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Said party of the second part also promises and agrees that he will keep full and true accounts of all the herein mentioned receipts, and that said accounts shall be open to inspection by said party of the first part through its officers or agents at any time during business hours. * * *

It is understood by and between the parties hereto that a corporation may be organized to which corporation this contract may be assigned, and which corporation, upon accepting said assignment, will succeed to all the rights and privileges, and assume all the obligations of the said party of the second part hereunder, but said party of the second part shall not be released from said obligations, and that this contract, nor any part thereof, shall not be otherwise assigned, transferred, sub-let or disposed of, and any other assignment, transfer, sub-letting or disposition thereof shall be void."

It was pursuant to this last clause that the New England Clam Bake Company was organized, and succeeded to the rights of Morris.

From the foregoing extracts taken from the contract, something more than a mere concession to do business within the Exposition grounds was given; it was in effect a leasing of the premises described, and the consideration of twenty-five per cent of the gross receipts of the business might well be, in part, in the nature of rent.

The bill under which the receiver was appointed in no way attacked the validity or full force of said contract, but on the other hand, expressly recognized it, and showed that, in substance, all of value that was possessed by the insolvent company was its rights thereunder, and that unless a receiver were appointed, and allowed to conduct the business permitted by the contract, the only assets of the company would be wasted and lost.

It was only upon the theory that the business should be continued under the contract, that the bill was filed and the receiver appointed, in order that the creditors of the company might save to themselves the only thing of much value that the company had.

That rent and other expenses incurred by a receiver,

under orders of court, should be paid by the receiver out of funds in his hands in preference to creditors, needs no citation of authorities. The receiver took the property, of which the contract in question was the thing of chief value, *cum onere*.

The rent reserved, or percentage of profits, by whatever name it may be called, was a part of the expenses which had necessarily to be paid in order to be permitted to carry on the business, and the receiver was properly ordered to pay it. There was nothing to refer to a master, and the order was properly made upon the petition of the appellant.

We will not discuss the various cases cited by the appellant, nor the numerous phases argued in his behalf. The receiver took possession and remained in possession subject to the charges of the contract, and he should pay them.

In principle the case is controlled by our decision in *White v. More*, assignee of the Wah Mee Exposition Company, 54 Ill. App. 606, (which was a case possessing many features in common with this,) supported by *Smith v. Goodman*, 149 Ill. 75.

The decree of the Circuit Court will therefore be affirmed.

National Masonic Accident Association v. George R. Titman.

1. ACCIDENT ASSOCIATIONS—*Representations as to By-laws—Estoppel*.—An accident association, through its agent, represented to an applicant for insurance, at the time his certificate of membership was issued, that certain printed by-laws exhibited and read to such applicant were the by-laws of the association then in force. *Held*, that such conduct estopped the association from denying the existence and force of such by-laws, as against its liability under the certificate.

2. SAME—*By-laws of Which the Insured Has No Notice*.—Under the facts of this case it is held that the insured was not bound by the provisions of by-laws of the existence of which he had no notice.

Assumpsit, on a certificate in an accident insurance association. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE

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HANEY, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

Appellee's instruction, referred to in the opinion of the court:

The court instructs the jury as a matter of law, that if the plaintiff was insured or assured a member of the defendant society, and at the time said insurance was procured the general agent of the society, whose business it was to know, represented to the plaintiff that a certain set of by-laws was in force, the defendant is estopped from denying the existence or force of said by-laws in this suit.

CLARK VARNUM and W. C. ANDERSON, attorneys for appellant.

It is contended that all the contracts of a mutual insurance association or company are made with reference to all the laws of the organization, and such laws, whether contained in the charter or by-laws, are deemed a part of each contract of membership, and are binding on all members. Citing Supreme Lodge K. of P. v. Knights, 117 Ind. 489; Bogards v. Farmers Mut. Ins. Co., 79 Mich. 440; Insurance Co. v. Barstow, 8 R. I. 343; Commonwealth v. Insurance Co., 112 Mass. 142; Same v. Same, 112 Mass. 116; Insurance Co. v. Gackenbach, 115 Pa. St. 492; Training School v. Insurance Co., 18 At. Rep. 393; Shaw v. Nat. Ben. Assn., 7 N. Y. Supp. 287; Sands v. Shoemaker, 4 Abb. App. Dec. 149; Planters Ins. Co. v. Comfort, 50 Miss. 62; Bersch v. Ins. Co., 28 Ind. 64; Holland v. Chosen Friends, 25 Atl. Rep. 367; Accident Assn. v. Burr, Sup. Ct. Neb., Mch. 5, '95.

The mutual rights of members of mutual benefit associations, whether voluntary or corporate, depend upon the constitution and by-laws, which have the effect of a contract, whose provisions are binding upon all. Bauer v. Sampson Lodge K. of H., 102 Ind. 262; Maderia v. Merchant's Exchange Society, 16 Fed. Rep. 749; Karcher v. Knights of Honor, 137 Mass. 368; Penfield v. Skinner, 11 Vt. 296; Treadway v. Hamilton, 29 Conn. 68; Walsh v. Ætna, etc., Ins. Co., 30 Iowa 145; Mitchell v. Lycoming Mut. Ins. Co., 51 Pa. St. 402; Brewer v. Ins. Co., 14 Gray 203; Covenant Ben. Assn. v. Spies, 114 Ill. 463, 468.

HENRY C. NOYES, attorney for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee brought suit against the appellant for an injury sustained by an accident. He was the holder of a policy, or certificate of insurance, against accidents, issued by the appellant. The accident occasioned hernia, or rupture. He recovered before the justice of the peace, and again in the Circuit Court, upon the verdict of a jury. No question is made but that if anything is due to appellee the judgment is for the correct amount. The defense is that the appellee was not insured against hernia.

The appellant is an Iowa corporation. One J. W. Dinsdale was general agent of the appellant in Chicago. The application was made by the appellee to Dinsdale, in Chicago, and was forwarded by the latter to the appellant at its home office in Des Moines, Iowa, where the certificate of membership was issued and transmitted back to Dinsdale, who delivered it to appellee. The application bore date, "Dec., 1893," and the certificate bore date "this 22nd day of December, 1893."

The certificate recites that it was issued in consideration of the warranties in the application, and that appellee was accepted by appellant as a member "subject to all the conditions and provisions of the articles of incorporation and by-laws thereof," and makes such conditions and provisions conditions precedent to the accruing or payment of benefits.

The controversy seems to have grown from the fact that the appellant had two sets of by-laws, one set from its organization in 1889, to May 16, 1893, and another set from that date.

Dinsdale was made manager of the appellant's agency in Chicago, in November, 1893. He testified that at the time he accepted the agency he told the secretary of the appellant that he would not take the agency without being shown a copy of the by-laws, and that the secretary replied that he had no copy of them with him, but would send them to him, Dinsdale. This occurred about a week or two before appellee's application for membership was taken. The sec-

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retary afterward sent from the home office the printed copy of articles of incorporation and by-laws of the appellant which were offered in evidence by appellee, to Dinsdale, who showed and read them to appellee at the time he made application for membership. No other by-laws were ever seen or known of by the appellee.

Neither in the application, the certificate of membership that was issued to appellee, the articles of incorporation, nor in those by-laws, was there any reference to hernia as an excluded risk or liability. Whether there were other by-laws adopted by the appellant and in force from May 16, 1893, wherein hernia was an excluded risk, it is not necessary to inquire.

The conduct of the appellant, through its agents, in representing to the appellee at the time the membership certificate was issued that the printed by-laws that were exhibited and read to him were the by-laws of the appellant then in force, estopped the appellant from denying, afterward, their existence and force as against its liability under said certificate.

The instruction that the court gave for the appellee on that point correctly stated the law. And it was not error for the court to refuse to give the ninth instruction asked by the appellee, under which the doctrine of estoppel applicable to such cases as this would be denied.

The court likewise properly refused to give the tenth instruction asked by appellant. The written notice there referred to was required only by the new by-laws of which appellee had no notice.

The by-laws which were shown and read to appellee by the general agent contained no requirement as to giving notice within ten days of the injury, and it was with reference to them that the contract was made.

Proof of notice was made, however, probably in pursuance of a requirement printed on the back of the certificate. The record, however, shows most clearly that it was not because of lack of notice, but because of the nature of the injury that the appellee's claim was refused payment.

In none of the negotiations that were had was insufficient notice claimed by the appellant, but on the other hand notice was recognized as having been given, and it was because of what the notice disclosed, viz., hernia, as the injury, that appellee's claim was rejected.

Upon the whole record, the judgment of the Circuit Court should be affirmed, and it is so ordered.

Mr. Presiding Justice WATERMAN dissents.

Agnes B. Jordan v. E. J. Huntington.

1. JUDGMENTS BY CONFESSION—*Vacation of, etc.*—Courts of law exercise an equitable jurisdiction over judgments entered by confession upon bonds and warrants of attorneys.

Judgment by Confession.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

HAMILTON & STEVENSON and ASA Q. REYNOLDS, attorneys for appellant.

DUNCOMBE & NEWTON, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered, after setting aside, on the motion of the appellant, a judgment in the same case, which had been entered by confession.

The abstract omits the affidavits by which the court was guided in the exercise of the equitable jurisdiction which it possesses as to judgments by confession. *Wyman v. Yeomans*, 84 Ill. 403.

Those affidavits are partially shown by another abstract prepared by the appellee. But on the whole case it appears that the appellant claims that being indebted to the firm of S. Peterson & Co., in the sum of \$593.21, she was induced

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by a representative of the firm to give notes dated September 24, 1894, seven for \$50 each and one for \$243.21, due in one, two, three, four, five, six, seven and eight months after date, bearing five per cent interest, which had warrants of attorney as parts of the text, without her knowledge, and of which she, on her motion to set aside the judgment, complained as a fraud. The action of the court may be conceded to have been informal, and yet not erroneous.

If the court had reduced the judgment to the amount she confessed was due, and ordered that executions should issue only as the notes respectively became due, and then to be indorsed to collect only so much as by the notes was due, she could have had no cause to complain. In effect, that is what has been done. As part of the same order by which the original judgment was set aside, the court entered, on the 20th day of October, 1894, this judgment for \$595, with the limitation that upon her failure "to pay said notes and each of them upon the date of their maturity, but not before, plaintiff have execution therefor."

The appellee, we infer, has no interest in this suit, being but an agent of the firm, the notes being indorsed to him only for collection.

The appellant has no reason to complain, and, in fact, does not complain here of injustice, but only of irregularity. The judgment is affirmed.

James T. Hair Company v. Charles T. Daily.

1. *ACCOUNT—Jurisdiction of Courts of Equity.*—Courts of equity will entertain jurisdiction in matters of account, not only where there are mutual accounts but also where the accounts to be examined are on one side only, and a discovery is wanted in aid of the account and is obtained; but in such a case if no discovery is required by the frame of the bill the jurisdiction will not be maintained.

2. *BILL OF DISCOVERY—Effect of Waiving an Answer Under Oath.*—The effect of waiving an answer under oath to a bill of discovery is to deprive the court in which the bill is filed of its jurisdiction for a discovery.

8. *EQUITY—Jurisdiction—Damages.*—A court of chancery has no jurisdiction of a claim for damages.

Bill for Accounting, etc.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed May 16, 1895.

BEACH & BEACH, attorneys for appellant.

It is contended that a bill for discovery is proper whenever the complainant has no other proof than that which is sought to be obtained by its means from the defendant; and where the defendant, while acting as the agent for the complainant, has received money which his principal is entitled to, the particulars and amount of which are unknown to the principal, a bill for discovery and an accounting should be maintained. And where a discovery is sought and is obtained, a court of equity has jurisdiction and will proceed to hear the entire case and grant full relief. A court of equity having obtained jurisdiction for any purpose will retain it and proceed to grant relief that is purely legal. Citing *K. R. Co. v. Davis et al.*, 40 Ill. App. 616; *Cannon v. McNab*, 43 Ala. 99; *Story's Eq. Jur.*, Vol. 1, Sec. 456 (13th Ed.); *Russell v. Madden*, 95 Ill. 485 (493); *Taylor et al. v. Tompkins, Admr.*, 2 Heisk. (Tenn.) 89; *Russell v. Clark's Executors*, 7 Cranch (U. S.) 69.

The gross fraud thus perpetrated upon complainant by the defendant should of itself be a sufficient ground for the intervention of a court of equity. We believe the rule to be well settled, that matters of account between persons holding confidential relations toward each other are peculiarly within the appropriate jurisdiction of courts of equity. 1 *Story's Eq. Jur.*, Sec. 465; *Fowler v. Lawrason* 5 Pet. (U. S.) 495; *Post v. Kimberly*, 9 Johns. (N. Y.) 493; *Corporation of Carlisle v. Wilson*, 13 Ves. Jr. 276; *Bruce v. Berdett*, 1 J. J. Marsh. 82; *Hipp v. Papin*, 19 How. 278; *Watt et al. v. Conger*, 13 Smedes & Marshall (21 Miss.) 412.

The jurisdiction of a court of equity does not depend on the absence of a common law remedy, for, although there

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may be a remedy at law, it may be inadequate to meet all the requirements of the particular case or to effect complete justice between the contending parties. And it has often been held that equity will retain jurisdiction solely on the ground that it is the most convenient and effectual remedy. *Craig v. McKinney*, 72 Ill. 312; *Bisph. Eq.*, 528-530; *Watt et al. v. Conger*, 21 Miss. 412; *Taylor et al. v. Tompkins, Admr.*, 2 Heisk. (Tenn.) 89; 1 Story's Eq. Jur., Sec. 457.

JESSE A. & HENRY R. BALDWIN, attorneys for appellee.

It is contended that the remedy in an action at law is full, adequate and complete, and that the decree of the court below dismissing the bill was proper and should be affirmed. No authorities cited.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant filed the original bill October 18, 1894, and the amended bill, to which a demurrer was sustained, and the bill dismissed December 22, 1894. The amended bill sets out three contracts between the parties, of employment by the appellant of the appellee as a traveling agent for the appellant. The first contract dated November 8, 1883, for a term of two years; the second dated May 30, 1885, for the term of two years, and the last dated October 26, 1887, for a term of five years, each in effect, though in varying words, requiring the appellee to devote himself exclusively to the business of the appellant; the second specifically provided against other engagements except upon written permission of the appellant, and then all benefits to belong to the appellant; and the third that the appellee "shall abandon all idea of dabbling in any other schemes."

The bill then very voluminously charges the appellee with misconduct, and alleges that "without any reasonable cause" he quit the service of the appellant about November, 1891, and went into competition with the appellant. An answer under oath is waived. Chancery has no jurisdiction of any claim for damages, and the oath being waived

there is no jurisdiction for a discovery. Sec. 20, Ch. 22, R. S. But the bill alleges that the appellee has made large profits from business in which he engaged in competition with the appellant, during the time he was in the service of the appellant, and of those profits an account is asked and a decree that the appellee be required to pay them to the appellant.

The bill charges that the transactions of which it asks the account were very numerous, during several years and in "different cities and towns in more than a dozen different States." The further allegations that the appellant does not know, and the appellee does know the particulars, and therefore the appellant needs a discovery, are of no avail, because oath to the answer being waived, the appellant could get no discovery; but the appellee might answer as he pleased, and if he avoided matters "irrelevant, impertinent or scandalous," the appellant could not except, but must accept as little information as the appellee might choose to give. *Mix v. People*, 116 Ill. 265; *Brown v. Scot. Am. Mtg. Co.*, 110 Ill. 235.

All the items, if any there be, are on one side; there is no mutual account. The bill would seem to be only an effort to take testimony before a master instead of a jury.

"Courts of equity will also entertain jurisdiction in matters of account, not only where there are mutual accounts but also where the accounts to be examined are on one side only, and a discovery is wanted in aid of the account, and is obtained. But, in such a case, if no discovery is asked or required by the frame of the bill, the jurisdiction will not be maintained." *Story's Eq.*, Sec. 458.

The mere fact of a fiduciary relation between the parties is not enough to make a case for a court of equity. *Taylor v. Turner*, 87 Ill. 296.

If the bill be true, the appellant is at liberty to prove it at law and recover whatever he may be entitled to.

The decree is affirmed.

Nellie Wilson, Administratrix of Geo. Wilson, vs. James
H. Gilbert, Sheriff.

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161: 49.

1. PRACTICE—*Where Goods are Returned to the Sheriff Under a Retorno Habendo.*—Where goods held by the sheriff under a levy by virtue of an execution are taken from him by a writ of replevin and the issue in replevin found in his favor, and a *retorno* ordered and executed, if the time of the execution has expired, an alias execution is not necessary. The proper course is to sue out a *venditioni exponas* and sell the property so returned to him, or he may proceed with a sale of the property by virtue of the levy made under the original writ.

2. LEVY—*When an Abandonment Will Not be Inferred.*—An abandonment of a levy will not be inferred from the mere mistaken and irregular issuance of an alias execution.

3. SAME—*Allegations of an Abandonment Treated as Surplusage.*—A sheriff made a levy upon certain goods which were taken from him by a writ of replevin. In contesting the suit he filed a plea among other things stating the issue and levy of the execution, and that afterward the same was, on, etc., returned, etc., with an indorsement thereon that said goods and chattels so levied upon had been replevied, etc., and no part of said writ satisfied; that upon the hearing and trial of said replevin suit, the said goods and chattels were found to be the property of the defendant, whereupon a writ of *retorno habendo* issued and said goods and chattels returned and delivered to him. *It was held* that the statement of the return of the execution in the plea was not to be construed into an abandonment of the levy, but merely as surplusage.

Replevin.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed June 8, 1895.

E. S. CUMMINGS, attorney for appellant.

It is contended that as the Brewing Co. did not proceed upon the original execution after the determination of the replevin suit of Notter v. Kemper, but abandoned the same, and sued out an alias execution, the defendant had no right to levy upon the property in question under the alias execution. Had the Brewing Co. desired to proceed upon the original execution, and to maintain the lien created by the original execution, it should have sued out a writ of *venditioni exponas* after the determination of the replevin suit. Hast-

ings v. Bryant, 115 Ill. 69; Bellingall v. Duncan, 3 Gilman 477; Freeman on Executions, Sections 57 and 59; Phillips v. Dana, 3 Scammon 551; Logsdon v. Spivey, 54 Ill. 104.

"Where a creditor causes an alias execution to be issued, before the property taken on the original writ is disposed of, he destroys the lien acquired by the original writ and waives it." Herman on Executions, 275.

"If a plaintiff sues out a second writ before the property taken under the first execution is disposed of, he destroys the first writ and waives the lien on the property taken under the first." Eckhols v. Graham, 1 Call (4 Va.) 428; Alley v. Carroll, 3 Sneed's Rep. (35 Tenn.) 110; Scott v. Hill, 2 Murphy (5 N. C.) 143.

LACKNER & BUTZ, attorneys for appellee.

It is contended that the issuance of the alias execution, the property at the time being in the hands of the sheriff, subject to the lien acquired by the levy of the first execution, was not an abandonment of the lien of that first execution; citing Smith v. Hughes, 24 Ill. 276; Freeman on Executions, Sec. 271; Corbin v. Pearce, 81 Ill. 463; West v. St. John, 63 Iowa 287; Menge v. Wiley, 100 Pa. St. 617; Bouton v. Lord, 100 Ohio St. 468.

The lien created by the alias execution issued on the 17th of June, 1892, related back to the execution issued on the 2d day of December, 1890.

Where property is held under a levy and is taken from the officer by replevin and the officer afterward gets possession again by levying another writ on the property, it amounts to a taking possession under the first writ, and the lien of the first writ, which had been temporarily suspended by the replevin action, is revived in all its original force. Cobbey on Replevin, Sec. 720; McIver v. Ballard, 96 Ind. 76; Richey v. Merritt, 108 Ind. 352.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Appellant's decedent, George Wilson, replevied from the appellee, then sheriff of Cook county, certain personal goods

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and chattels incident to the carrying on of a saloon business, which appellee had levied upon in favor of the Peter Schoenhofen Brewing Company, about a year and a half before, as the property of one Bernard H. Kemper, but which had remained the subject of litigation in a certain other replevin suit against the appellee during that time, and which the said George Wilson claimed to have purchased, or acquired ownership of, pending this last mentioned replevin suit, and before said levy was disposed of, through a sale by a receiver in a cause, for the dissolving of partnership between the said Kemper and his partner, wherein the receiver was appointed.

The cause was heard by the court without a jury, and at the conclusion of the evidence offered by the appellant, the appellee offering no evidence, the court found the issues for the appellee (defendant), upon the evidence offered by the appellant and the pleadings, and gave judgment finding the defendant (appellee) not guilty, and awarding a writ of *retorno habendo* to the appellee for the property replevied, and from such judgment this appeal is prosecuted.

The cause was tried upon the issues made upon a special plea of the defendant (appellee), setting up, in substance, the following facts:

That on December 2, 1890, the Peter Schoenhofen Brewing Company recovered a judgment against B. H. Kemper, who was then the owner of the goods in question, upon which judgment a writ of *feri facias* was sued out upon the same day and levied upon the said goods; that two days later the said Kemper and another replevied the said goods from the defendant sheriff, who returned the said writ of *feri facias*, "no part satisfied," and recited in his return the replevying of said goods; that said replevin suit was pending until June 7, 1892, when, upon a trial, the issues were found for the defendant and a writ of *retorno habendo* awarded; that thereupon the writ of *retorno habendo* issued, under and by virtue of which writ the said goods were taken from the plaintiff, George Wilson, and were returned to the defendant, the sheriff; and "that on, to wit, the 17th day

of June, 1892, an alias writ of *feri facias* was issued out of said Circuit Court of said county, by the said Peter Schoenhofen Brewing Company, against the said B. H. Kemper, directed to the sheriff of said county aforesaid, commanding him, as in the first writ of *feri facias*, to wit, on the same day in the said declaration mentioned, being the same time, when, etc., said alias writ being then in full force and unsatisfied, then took the said goods and chattels in said declaration mentioned and detained the same in execution of the said alias writ, which are the same taking and detention in said declaration above mentioned."

To this plea the plaintiff filed a general replication that the plaintiff, by reason of anything in said plea alleged ought not to be barred of having her aforesaid action, "because she says the said goods and chattels in the said declaration mentioned at the said time, when, etc., were the property of George Wilson, deceased, and not of Bernard H. Kemper."

Upon the issues thus formed the cause was tried. One of the material facts set up in the plea, and not denied by the replication, is, that the goods were taken from the appellant and returned to the appellee, the sheriff, under and by virtue of the writ of *retorno habendo* awarded in the replevin suit that was tried on June 7, 1892. The effect of the judgment in that suit was to restore the sheriff to the possession of the goods which he had acquired by virtue of the levy under the execution against Kemper.

Instead of issuing an alias execution thereafter, as the plea alleged was done, the regular course would have been, the prior levy remaining undisposed of, to sue out a *venditioni exponas*, and sell the property so returned to the sheriff. *Marshall v. Moore*, 36 Ill. 327; *Babcock v. McCamant*, 53 Ill. 214.

Or, the writ of *venditioni exponas* conferring no new authority upon the sheriff, but only requiring him to do that which is already his duty to do, he might have proceeded with a sale of the property by virtue of the levy previously made under the original writ. *Willoughby v. Dewey*, 63

Ill. 246; Bellingall v. Duncan, 3 Gil. 477; Phillips v. Dana, 3 Scam. 551; Logsdon v. Spivey, 54 Ill. 104; Hastings v. Bryant, 115 Ill. 69.

Now, the appellee having once levied upon the goods, and his right continuing to sell them by virtue of the levy, the suing out of the alias writ as set up in the plea was unnecessary, and at most an irregularity, and the setting up of that fact might well be treated as surplusage. But it is contended that the effect of the plea is to show that appellee had abandoned the former levy and that he took and held the goods under the alias execution.

Waiving the question of whether the appellee had the right to release the original levy and make another without the consent of the execution debtor, or an order of the court out of which the execution issued, which it has been held, can not be done (Smith v. Hughes, 24 Ill. 270), we do not understand the plea to be open to such objection. The plea as certainly avers the return of the goods to the appellee under the writ of *retorno habendo* in the Kemper replevin suit, as it does their subsequent taking under the alias writ on the original judgment. It having been seen that the original execution, or a writ of *venditioni exponas* to carry out the original execution, was all that was needed by the appellee, the pleading of surplus matter, like the issuance of an alias execution and the taking again of the goods thereunder, is not enough of itself to establish an abandonment of the original levy. An abandonment of the original levy will not be inferred from the mere mistaken and irregular issuance of the alias writ. Freeman on Executions, Sec. 271, and cases there cited.

Upon the authority of the cases referred to in Freeman, *supra*, it would seem clear that the fact pleaded, of the issuance of the alias writ and the taking thereunder, when taken in connection with the other fact pleaded, of the former taking by virtue of the original writ, and the award of the writ of *retorno* to the appellee, under which the goods were returned to him because of the former taking, should not be regarded as the stating of an abandonment of the

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former levy. At the most, it was pleading matter that was not at all essential to appellee's rights, and was surplusage.

An amendment of the plea, striking out the surplus matter, while advantaging the plea artificially, would not have changed its legal effect nor have varied the proof before the court.

The question was one purely of law, and the judgment of the court was right. It will therefore be affirmed.

MR. JUSTICE GARY.

There is another reason for affirming this judgment. The replication says that the goods "at the said time when, etc., were the property of George Wilson, deceased, and not of Bernard Kemper."

The time at which the plea alleges that the goods were Kemper's is December 2, 1890, and the replication being a traverse of the plea, the "etc." refers to that date; "being construed to mean 'every necessary matter that ought to be expressed.'" Am. & Eng. Cycl. 570.

There is no pretense that Wilson had then any claim to the goods.

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**George F. Trevette and Frank B. Swift, copartners as
Trevette & Swift, vs. Commercial Loan and
Building Association.**

1. *ESTOPPEL—Mechanic's Liens—Priorities Under Different Contracts.*—A building association loaned to the owner of premises, money secured by bond and trust deed to be used in the erection of a building thereon to be paid by the association in installments, to the contractor, as the building progressed. Relying upon the truth of written statements signed by the contractor, accompanied by architect's certificates as to the amounts yet to become due him upon his contract, the association paid the money out accordingly. The contractor, without the knowledge of the association, entered into another contract with the owner of the premises for additional work and did some extras upon the building, concerning which nothing was shown by his statements. It

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was held that by his conduct in presenting such statements to the association he was estopped from claiming a lien prior to that of the association upon the said premises, as they would have been under the original contract without the extras and additional work. But upon such extras and additional work he was entitled to a prior lien.

Bill for Foreclosure and Cross-Bill for a Mechanic's Lien.—Appeal from the Superior Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1895. Reversed and remanded with directions. Opinion filed June 8, 1895.

STATEMENT OF THE CASE.

I. B. Miller and H. J. Miller, on March 22, 1893, executed their bond and trust deed (recorded March 27, 1893), to secure a loan of \$15,000 from the Commercial Loan and Building Association, upon premises described in the bill of complaint, for the purpose of thereon erecting a building. They subsequently made default in the performance of the conditions of said bond. A bill to foreclose said trust deed was filed by appellee in the Circuit Court of Cook County on November 15, 1893, in which bill the obligors in said bond were made parties defendant, as were also George F. Trevette and Frank R. Swift, appellants herein, and various other parties whose names were shown of record as having filed mechanic's liens against said premises.

Answer to said bill was filed by appellants herein, and also a cross-bill, in which it is alleged that by reason of a certain contract for furnishing labor and materials upon said premises, entered into between said appellants and the said Millers on April 12, 1893, and for the furnishing of certain extra work upon said premises, said appellants are entitled to a mechanic's lien upon said premises in the amount of \$1,738, and that said lien is superior to the lien of appellee under the aforesaid bond and trust deed.

On behalf of appellants it is asserted that they are entitled to a mechanic's lien by reason of a contract entered into between them and the owners of the premises on or about April 12, 1893, for additional improvements of the value of \$1,600, and for extra work furnished before June

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10, 1893 (at which time appellants claimed to have completed all their work in said premises), and that said contract creates a first and prior lien on said premises. Appellee contends that the deed of trust in its favor, recorded on the twenty-seventh day of March, A. D. 1893, to secure a loan of \$15,000, moneys to be advanced (and actually paid out) for the erection of said improvements as the same progressed, created a first and prior lien on said premises in favor of said appellee; that said appellants had notice of the existence of said mortgage lien; and said appellants had a contract with the owners of the premises for carpenter work upon the building in question for the sum of \$8,000, of which they apprised appellee on six different occasions, by presenting architect's certificates for the payment of moneys out of said loan, signed by the owners of the said premises and the architect, in each of which certificates the total amount of the contract of said Trevette & Swift was stated at \$8,000, and by the last of which it appeared that the entire sum of their contract was paid and nothing remained due and owing to the appellants; and that relying upon the truth of the statements contained in said certificates so presented to appellee by appellants, the appellee paid to them the amounts of said certificates out of the moneys arising from said mortgage loan.

Appellee further contends that according to the allegations of said appellants and the testimony, an additional contract of \$1,600 for additional work, and one for \$138 for extras had been entered into between them (Trevette & Swift) and the owners of the building, without the knowledge of appellee, at a date earlier than the presentation of any or either of said six orders for money (excepting the first of them), and that the amounts of said additional contract and extras did not appear on said orders or certificates. It is contended, therefore, by appellee, that by the action of said appellants in presenting said orders or architect's certificates, in which the amounts of their contracts and claims against said premises and of the balance due and owing to them from time to time were falsely stated, said

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appellants have estopped themselves, so far as the interests of said appellee are concerned, from claiming any amounts as due and owing to them upon the said premises other than the sum of \$8,000, set out in the architect's certificates presented by them to appellee, and upon which they received moneys from it, and that they are estopped by their conduct in this matter from claiming any lien on said premises superior to the lien of appellee.

The testimony introduced before the master in chancery to whom the cause was referred shows that the Commercial Loan and Building Association loaned to Miller the money, to secure which the trust deed was given, and that the money was to be expended under the supervision of its trustee and attorney during the progress of the building, upon proper vouchers; that appellee required Miller to furnish lists of all moneys due and to become due until completion of the work, and that two such lists were furnished for his guidance on, respectively, April 1, 1893, and May 17, 1893. Guided by these lists, the trustee O K'd the architect's certificates and owner's orders for money upon the association thereon, to the various contractors upon said building, among others, Trevette & Swift, relying upon the truthfulness of the representations contained in the certificates so presented by said contractors to him and to the association.

Trevette & Swift presented a certificate signed by the architect, and marked correct and signed by the owner, dated April 1, 1893, for \$2,000, on account of their work as contractors for the carpenter work and joiner work, showing the total amount of their contract to be \$8,000, extra work nothing, total amount of certificates issued, \$5,500, and a balance due to them of \$2,500.

Thereupon the trustee O K'd the certificate and the association paid it.

Later, appellants presented and received the money in like manner under other certificates bearing date April 15, 1893, May 2, 1893, and May 16, 1893, May 26, 1893, and June 16, 1893.

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In all of these certificates signed by the architect and owner and presented to the mortgagee and its agent, the trustee, by Trevette & Swift, the amount of the contract for carpentry and joiner work is named as \$8,000, extra work nothing, the deductions of the total amount of certificates issued from the contract agreeing with the amount as shown by the preceding certificates, and in the last certificate introduced in evidence showing that the contract price was \$8,000, the total amount issued was \$8,000, and the balance due was nothing, being the certificate under date of June 16, 1893, upon which \$100 was paid to Trevette & Swift, the receipt of which they acknowledged by their signatures upon said certificates.

Trevette & Swift introduced in evidence a contract in writing with the owners for the finishing of the third story of a three-story apartment building for \$1,600, being dated April 12, 1893. The extra work for \$138 is claimed was all performed during the beginning of June; the memorandum for it was dated about June 1, 1893.

EWING, WINCHESTER & CRAIG, attorneys for appellants.

It is contended that there are two sufficient reasons why appellants should not be estopped, as against appellee, to assert their claim for a lien based upon their contract with Miller, dated April 12, 1893, to do the finishing of the third story of the building in question for \$1,600.

First. If there was any obligation upon appellants to advise the appellee, at the time they presented the last five certificates issued on their first contract, of the existence of their later contract with Miller for the finishing of the third story of the building in question, it must have arisen either from the fact that appellants had some contractual relation with appellee, which laid upon them such obligation, or from the fact that appellants had knowledge of facts from which they might have foreseen that injury would result to the appellee by reason of their presenting the architect's certificates issued on appellants' contract for \$8,000, without ad-

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vising appellee of the existence of their subsequent contract for \$1,600.

A declaration, to constitute an estoppel, must be one, the injurious influence of which might and ought to have been foreseen. *Knoebel v. Kircher*, 33 Ill. 308.

Second. The appellee was not induced by the action of the appellants in presenting to appellee the last five certificates issued on the appellants' contract for \$8,000 without advising appellee of the existence of their later contract for \$1,600, to take any action which resulted in substantial prejudice to it.

If the person claiming the estoppel was legally bound to do what he did, there is no estoppel in his favor. *A. & E. Ency. of Law*, Vol. 7, page 18, note 1.

STERN, OSBORNE & LOUER, attorneys for appellee.

It is contended that the appellants were estopped from asserting a prior lien.

The law upon this matter seems to be very clear. *Herman* in his work on "Estoppel" page 995, says:

"In those States where an implied lien of a vendor is regarded as an existing right to priority of payment out of the land thus incumbered, if a vendor who holds a lien for the payment of the purchase money, by affirmative acts and declarations induces the belief on the part of the subsequent purchaser, prior to his purchase, that he renounces or abandons his lien, it is a waiver thereof, and the vendor can not thereafter enforce it to the prejudice of such purchaser." *McLaurie v. Thomas*, 39 Ill. 291; *Atkins v. Lindsey*; 39 Ind. 296; *Burns v. Taylor*, 23 Ala. 255.

In order to create such a waiver as to estop a party from setting up or claiming a lien there must be an intention implying either an actual determination of the lien holder to surrender the right, or such acts on his part that the public may reasonably suppose he did waive his security of lien, in which case he will be estopped from afterward asserting it. *Scott v. Orbeson*, 21 Ark. 202; *Chapman v. Hamilton*, 19 Ala. 121.

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Any conduct in the vendor that makes it unfair, unjust or inequitable for him to enforce his implied lien will discharge it. *Clower v. Rawlings*, 17 Miss. 122; *Lynch v. Dearth*, 2 Pa. St. 101; *Atkinson v. Lindsay*, 39 Ind. 296; *Brown v. Bowen*, 30 N. Y. 520; *Wendell v. Van Renssler*, 1 J. C. R. 344; *Town v. Needham*, 3 Paige 545; *Storr v. Barker*, 6 J. C. R. 166; *Thompson v. Blanchard*, 4 N. Y. 303; *The Continental Nat'l Bank v. The Nat'l Bank of the Commonwealth*, 50 N. Y. 575; *Hefner v. Vandolah*, 57 Ill. 520; *Hill v. Blackwelder*, 113 Ill. 283; *Shall v. Biscoe et al.*, 18 Ark. 142; *Wetmore v. Royal et al.*, 55 Minn. 162.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

We are of the opinion that as to the said premises as they would have been had not the additional improvements in the third story, made under the contract of April 12, 1893, and the extra work, been done, appellants are by their conduct estopped from claiming a lien superior to that of appellee, from whom they received \$8,000, under the representations in the certificates presented by them.

Upon the additional value imparted to the premises by the work done by appellants in the third story, and the extra work, for which they claim a lien of \$1,738, they are entitled to a first lien.

While not approving of the conduct of appellants in failing, in presenting their certificates, to disclose to appellee the additional contract for work in the third story which they then had, and the extra work, yet as such work was not contemplated by the contract known to appellee upon which it paid the \$8,000, we do not think that appellant should be deprived of a lien upon the additional value thus imparted. Their conduct was that of suppression, not of a positive direct statement that they had no contract other than that upon which they were paid in full; and it is not clear that by such suppression appellee has suffered any loss.

Upon the value of the premises without the improvements done under the contract for the third story, and without

Fish v. Chicago Stamping Co.

the extra work, for which appellants claim a lien of \$1,738, appellee has a first lien and appellants a second lien.

Upon the additional value added to the premises by said work done under the said contract for the third story, and the extra work, appellants have a first lien and appellee a second lien.

The decree of the Circuit Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Appellants and appellee will each pay the costs by them respectively made in this court; neither will recover costs against the other.

Reversed and remanded with directions.

Alexander J. Fish v. Chicago Stamping Company.

1. *CONTRACTS—Manufacture of Experimental Articles.*—Where a person follows the directions of another in making for him an experimental article, from a pattern furnished, he is not to be denied payment because the article is not as fit for the uses contemplated, as the pattern furnished.

2. *EVIDENCE—Copies—Notice to Produce Originals.*—Where a notice to produce an original document is not given in time to warrant the introduction of a copy, the court may, notwithstanding, permit its admission, with the understanding that time shall be given the adverse party in which to produce the original and leave thereafter to move to strike out the copy.

Assumpsit, for goods sold and delivered. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed June 3, 1895.

JOHN S. COOK, attorney for appellant.

It is contended that the court erred in admitting secondary evidence of the contents of the letter of January 23, 1891, without notice served upon appellant a reasonable time before the trial to produce the original. Citing *Cummings v. McKinney*, 4 Scam. 59; *Bushnell v. Bishop Hill Co.*, 28 Ill. 207; *Cody v. Hough*, 20 Ill. 45.

ROSENTHAL, KURZ & HIRSCHL, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The plaintiff, appellee, made to appellant the following proposition:

"CHICAGO, Jan. 23, 1891.

A. J. FISH & Co., No. 159 Lake St., City:

GENTLEMEN: We confirm our verbal quotations on your Charlotte Russe Molds as follows:

For a lot of 10 M, made from plain tin.....\$ 70.00 per M.

Re-tinned..... 110.00 " "

For a lot of 25 M, made from plain tin..... 55.00 " "

Re-tinned..... 95.00 " "

These are to be made from first quality charcoal tin, and the prices are for the complete mold, including the inside and outside pieces.

We will give you one year's time to take any quantity you order, and if for any reason you should fail to take the entire order, we will release you by the payment of whatever expenses we have been to, which will not exceed \$200.

Subsequent orders will be furnished at the same prices as we quote on 25 M lots.

Yours truly,

THE CHICAGO STAMPING COMPANY.

L. STURGES."

Defendant did not wish to order 10,000 at one time, but wished to order 1,000, with the privilege of changing his order to 10,000, and agreed that in case he should not take 10,000, he would pay the cost of making the tools.

Appellee agreed to this, made the tools and some molds, of which molds appellant took 546, he paying for them. The cost of making the tools was \$175.

The molds did not suit. Appellant complained of them. The heat of a baking oven expanded them in such a manner that the raw edge would cut the hand, and the covers snapped off in the oven, or would not come off when desired.

There is contradictory evidence as to what was said, done and promised as to the defective molds.

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Under the contract, appellant not having taken the entire order, was bound to pay the cost of making the "tools," by which the molds were made. If the molds for which he paid were defective through the fault of appellee, appellant might, perhaps, have had his damage therefrom deducted from the cost of the "tools," but he failed to prove any amount of damage; and as must be presumed, the court below found the tools were not defective, and that appellant failed to prove that the defective condition of the molds was owing to any fault of appellee.

The manufacture of these molds was an experiment; how they would work in actual use was not known. The mold was a new thing, for which appellant had applied for a patent.

We see no sufficient reason for reversing the finding of the court below upon the facts.

The written proposition was proven by a letter press copy introduced by appellee. Notice to produce the original was not given in sufficient time to warrant the introduction of a copy, but the copy was admitted with the understanding that time should be given appellant in which to produce the original, and leave to appellant to thereafter move to strike out said copy. Ample time, one week, was given. The original was not produced and no such motion to strike out was made.

The judgment of the court for \$175 is affirmed.

MR. JUSTICE GARY.

I dissent on the ground that in my judgment the appellee took the risk of being able to make working molds of tin, but as the case must end here, it is not worth while to enlarge.

Rand, McNally & Company v. Continental Mutual Fire Insurance Co.

1. *INSURANCE—Collection of Assessments—Burden of Proof.*—In an action by a mutual insurance company to recover an assessment the burden is upon the company to show that the assessment was in accordance with the charter and by-laws as alleged in its declaration.

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2. LAWS OF FOREIGN STATES—*Must be Proved.*—The laws of foreign States must be proved.

Assumpsit, for an assessment in a mutual insurance company. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed June 8, 1895.

G. W. & J. T. KRETZINGER, attorneys for appellant.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action by a mutual fire insurance company, to recover an assessment, said to have been made pursuant to the charter and by-laws of the company, by order of the Circuit Court of La Porte County, in the State of Indiana, upon a note given by appellant as a member of said company.

There were two special counts and the common counts in the declaration.

To this a special demurrer was filed, which was overruled, whereupon appellee proceeded to make proof upon an assessment of damages.

The note introduced in evidence was as follows:

“MICHIGAN CITY, IND., April 10, 1889.

For value received, in Policy No. A 551, dated the 26th day of March, 1889, we promise to pay to the Continental Mutual Fire Insurance Company the sum of three hundred sixty-seven and 50-100 dollars, by installments, at such times as the directors of said company may order and assess for the losses and necessary expenses of said company, pursuant to its charter and by-laws. It is hereby expressly understood and agreed that this note is not transferable, and that there is no liability beyond the face amount thereof.

RAND, McNALLY & Co.

Home Office No. —.”

Appellee did not present or prove the charter or by-laws

Miller v. Hawes.

of the said insurance company; it therefore failed to show that the assessment was in accordance with the charter and by-laws, as alleged in its declaration.

The laws of foreign States must be proved. It is unnecessary to discuss the questions raised by the demurrer.

The judgment of the Circuit Court is reversed and the cause remanded.

John S. Miller v. Helen E. D. Hawes.

1. LEASES—*Assignments—Guaranties Not Affected by Other Demises.*—When an assignment of a lease is upon the express condition that the assignor shall remain liable for the prompt payment of the rent and performance of the covenants of the lease on his part as therein mentioned, the fact that the landlord demised other premises to the assignee of the lease shortly afterward, does not affect the liability of the assignor under the provisions of the assignment.

2. APPLICATION OF PAYMENTS—*In the Absence of Directions.*—A creditor who receives money from his debtor with no direction as to the application of it, is at liberty to apply it to any debt due from such creditor.

3. LANDLORD AND TENANT—*Right of Re-entry may be Waived.*—If the landlord has a right to re-enter he is not obliged to do so.

Debt, for rent. Appeal from the Superior Court of Cook County; the Hon. GEORGE W. BLANKE, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed June 3, 1895.

MERRITT STAER and C. A. WINSTON, attorneys for appellant.

KIRK HAWES and EDWARD E. PERLEY, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee succeeded to the estate of her father, John H. Dunham, in the premises the rent of which is the subject of this suit, as devisee. April 3, 1891, he demised by indenture the premises to the appellant for a term to end

April 30, 1894, "to be occupied as a private residence, and for no other purpose whatever." The lease prohibited any assignment, sub-letting, or occupation by any other person without the written assent of the landlord.

An assignment and consent as follows were indorsed on the lease :

"ASSIGNMENT AND ACCEPTANCE.

For value received I hereby assign all my right, title and interest in and to the within lease unto Edward M. Luce, his heirs and assigns, and in consideration of the consent to this assignment by the lessor, guarantee the performance by said Edward M. Luce of all the covenants on the part of the second party in said lease mentioned.

In consideration of the above assignment and the written consent of the party of the first part thereto, I, said Luce, hereby assume and agree to make all the payments and perform all the covenants and conditions of the within lease by said party of the second part to be made and performed.

Witness our hands and seals, this seventh day of April, A. D. 1892.

JOHN S. MILLER. [SEAL.]

EDW. M. LUCE. [SEAL.]

CONSENT TO ASSIGNMENT.

I hereby consent to the assignment of the within lease to Edward M. Luce, on the express condition, however, that the assignor shall remain liable for the prompt payment of the rent and the performance of the covenants on the part of the second party, as therein mentioned, and that no further assignment of said lease or sub-letting of the premises or any part thereof, shall be made without my written assent first had thereto.

Witness my hand and seal this seventh day of April, A. D. 1893.

J. H. DUNHAM. [SEAL.] "

Twenty days thereafter Dunham demised another house to Luce and Luce occupied that, and the first house was occupied by a Mr. and Mrs. Aubrey—the rent paid to Dunham

by Mrs. Aubrey's mother—and the receipts given in the following form :

"\$60.00.

CHICAGO, June 1, 1892.

Received of Mrs. Mary E. Fuller, per W. M. Booth, attorney, sixty dollars in full for one month's rent from June first, 1892, to July first, 1892, for the premises No. 136 E. 50th street."

The rent was so paid until May 1, 1893.

Luce paid money without any direction as to the application of it, and the appellee has applied what he paid, so far as was necessary to satisfy the rent of the second house, to the payment of that rent, thus leaving part of the rent of the first house unpaid; but no money paid by Luce when no rent was due on the first house was applied to subsequently accruing rent of that house.

No question as to amount recovered is in the case, if the appellant be liable for any rent, and if the appellee had the right to apply what Luce paid as it was applied.

The appellant's position is that by the assignment to Luce with consent of the lessor, the appellant became, as to the covenant in the lease to pay rent, a security for Luce, and that making a lease to Luce of another house, increased his burden, and thus diminished his ability to pay, and discharged the appellant from the rent of the first house. No authority is cited that the creditor may not deal with the principal debtor in other transactions, without thereby discharging the surety. Although there is considerable special pleading in the case the briefs are wholly upon the facts so far as shown by the evidence. That evidence does not show any surrender by Luce of the lease of the first house, either by contract or operation of law. It does not show that the Aubreys or Mrs. Fuller were ever the tenants of Dunham. Receipts to Mrs. Fuller are quite consistent with the continuing tenancy of Luce and a sub-tenancy by her—she paying her rent directly to the superior landlord—and there is no evidence of what was the real arrangement. *Grommes v. St. Paul Trust Co.*, 147 Ill. 634.

The landlord receiving money from Luce, with no direc-

tion as to the application of it, was at liberty to apply it to any debt due from Luce. *Davis Sewing Machine Co. v. Buckles*, 89 Ill. 237.

If the landlord had the right to re-enter under the doctrine of *Kew v. Trainor*, 50 Ill. App. 629, 150 Ill. 150, he was not obliged to use it. *Chicago Att. Co. v. Davis S. M. Co.*, 33 Ill. App. 362.

The judgment is affirmed.

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162 398

Robert Porter v. Mary A. Porter.

1. **SEPARATE MAINTENANCE**—*Statutory Requisites*.—The living of a married woman separate and apart from her husband, in order to entitle her to a decree for separate maintenance, must be without her fault.

Bill for Separate Maintenance.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1895. Reversed, and bill dismissed. Opinion filed June 8, 1895.

THORNTON & CHANCELLOR, attorneys for appellant.

THOMPSON, HAWES & McCASLIN, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was a suit for separate maintenance.

Appellee married a widower twenty years her senior, he having a grown-up daughter living with him. She took her sister to live with her and insisted against her husband's advice upon having her brother James come to live with them. Appellant told her that he had a young girl growing up and James was a young man, and the way the rooms were situated, he, appellant, did not think it would be a good thing to have James come; it might create trouble. Her brother John also came to live in the family.

They lived, he testifies, for one year harmoniously; she

now complains that she was not provided with such money for clothing or with such help and medical attendance as she needed.

He was in debt, his property was mortgaged, much of it entirely unproductive; his income being derived from a livery business which he carried on and in which he worked.

There is no evidence tending to show that his income was over \$1,500 per annum. All that he possessed he had gained by hard work, and it could be kept only by constant attention and prudence. He evidently appreciated the necessity for economy more than did she; but that she had any cause in this regard for complaint there is no evidence, such as ought to move a court of equity to take out of his hands the control of the question as to in what style he should maintain appellee.

After a time he became suspicious of the conduct of her brother James, whom, against his remonstrance, she had brought into his family. This brother, he feared, was unduly intimate with his daughter, and told appellee so; she treated the fear lightly, as unwarranted and unjust.

The daughter was found to be pregnant and she declared that appellee's brother James was the father of her child.

Appellant says that he went to the stock yards to find James; that James avoided him.

Appellant told appellee that James must leave the house; she said that she did not like to have him leave, but he did depart. Whereupon appellee forsook appellant's bed and took up her abode in the room above, which her brother had vacated. To this appellant objected, but she persisted and never returned. Appellant says that after this, things were unpleasant.

After living in this way for some time, he went to her room and gave her twenty dollars. Their marital relations were resumed, although they seem to have continued, she to sleep up and he down stairs.

Appellant's son was very fond of his father, who says he noticed that appellee wished to wean little Harold from

him; that the boy had the habit of running toward him saying, "Hullo, pa, I will kill you." Appellant thus describes what followed:

He did this a great many times, and I says to him, "Harold, where in the world did you learn that?" "Oh, I don't know," was all the answer I could get, and I asked Mrs. Porter how he learned that. He heard the boys say so out doors. "Well," says I, "now this is very strange."

On this particular night I came home about half past eight o'clock. There was no one in the house. I sat down stairs until she came home. He came running towards me, and says, "Hullo, pa, I will kill you." And I says, "Harold, who in the world is learning you bad talk? Some one must be learning you it. I am afraid you are getting bad bringing up." And she flew into a passion and she says, "I would hope that he was getting better bringing up than your daughter, Lill." I says to her, "Mame, what do you mean?" "Well," she says, "I mean that you are nothing but a brute. That you have been intimate with your own daughter." That is what she said, and that was the cause of the trouble. I says, "You dirty, vile woman. If you were a man I don't know what I would do. You know it is lies from beginning to end. As long as you think that of me it is an impossibility for you and I ever to live together as man and wife." She went up stairs. In the morning I says, "Mame, I have been thinking this thing over all night. I haven't slept any over this." And she said, "I mean just what I say." I says, "If I am that kind of a man you and I certainly can't live together, and if you want to, decently let me know what you want; you and I had better separate if you think that way of me." I came home to dinner; came home to supper and got my supper and that night I slept there; she was up stairs; and the next morning I got my breakfast. There was nothing said during this time, and I came back to dinner, and discovered that she had had a wagon there; had taken away a lot of goods from the house, and went away. I did not tell her to get out, nor words equivalent to that. I went to Mr.

Porter v. Porter.

Ehart's to see my boy. There was no objection made to my first call. The next time I called she met me. She says, "What are you doing here?" "Well," I says, "I come to see my boy." "Well," she says, "I don't want you to come around here at all." "Well," I says, "if the people of the house say so, I certainly won't come." "Well, I don't want you to come. If you come around bothering me, I will go somewhere else." Says I, "I can't help that, I want to see my little boy." Then I says, "I am keeping this house open for you." She says, "Don't you keep it open for me one minute; I will never live with you again." And then on the top of that she says, "If I was your daughter, Lill, I would take a revolver and put a bullet in your head." The following day I received a letter from her first attorney in this case, stating that I must keep away from the house. So I stayed away from the house until I went there to see my boy when I heard that he was hurt. I never told her at any time to get out of the house, nor to keep away from the house.

As to making the terrible accusation of incest, appellee testified:

"In my last conversation with Mr. Porter before leaving the house, I alluded to him as being the cause of his daughter's ruin. That is what I said. I charged him with what she said. He said there was nothing but brute instinct in me. He was angry.

The daughter testified that she never told appellee or any one else anything of the kind.

Appellee testifies that her husband once expressed to her his belief that she was unduly intimate with a certain physician; if such statement was made, it was without cause; as related by appellant it seems to have been more the rude utterance of a coarse man than an accusation to which any one attached importance.

Appellee filed an amended bill verified by her oath, alleging that during the month of February or March, 1890, appellant asked her to have unnatural relations with him and sought to compel her to do so. That about the

month of July, 1891, appellant did the same thing. She left him in February, 1893.

There was no evidence that would sustain this horrible charge; the court below found that it had not been proven, and at the hearing expressed the opinion that the charge of incest by appellant with his daughter was untrue, and that the court did not think appellee thought it true.

Appellant was not a "carpet knight to caper nimbly in a lady's chamber." He was a plain, rough, and according to the statements of appellee, coarse man; rising early, working late, among horses and hostlers. He had a bad habit of swearing when annoyed, as he often was, at household bills which he thought large and found it not easy to pay. Appellee came to hate him. She prayed to God that she might never see his hateful face again; she declared that she would die before she would cook for him again; behind his back she called him old devil and old Porter; she denies that she swore at, save in mocking of, him. She found time and had money to go to theaters and races; she denies the statements of disinterested witnesses that she bought lottery tickets. His amusement seems to have been confined to listening to the prattle of his boy. Had he been more of a gentleman he would not have used profane language, and he would have borne his wife's constant appeals for money for her personal convenience and pleasure with more equanimity, perhaps with greater acquiescence. Nevertheless, it is but just to say that there is nothing in this record showing that he ever failed to provide a comfortable home and support for his family, or that he ever refused to her spending money, when his pecuniary circumstances were such that, with due regard to his business and its obligations, he had it to give.

He was not a model husband, but he does seem to have made repeated efforts to end their bickering; to have felt that he owed to his wife some duty, and to have looked upon the marriage obligation as a thing of consequence.

The preponderance of the evidence given by disinterested witnesses does not sustain her charges of brutal speech and conduct.

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He seems to have suffered more than did she, and his patience was more severely tried by the course of their family life than was hers. Under the circumstances she could well have overlooked much in a man who saw his daughter's ruin following the persistence of appellee in bringing and keeping her brother James in the house.

Whatever may be its effect, our statute as to separate maintenance was not intended to act as an encouragement to wives to leave their husbands.

As the wife of appellant, living with him, duties would rest upon her; burdens in respect to his comfort and the care of his family must be borne. By the decree in this case she is given a sum amounting to more than half of his entire income—an income which he has only as the fruit of unremitting toil; while she is, under this decree, called upon to do no more than the "lilies of the field."

Few persons, men or women, would have acted more mildly than did he under the immediate cause of the separation—her unjustified charge of incest. Going away upon the strength of what he then said was not going away without fault upon her part.

He offered and still offers his home to her, to receive and treat her kindly; she is persistent in her refusal.

She is not "without her fault living separate and apart from her husband."

The duties and obligations of marriage are altogether too frequently looked upon as something that may be shaken off at pleasure. The decree of the Superior Court is reversed and the bill dismissed.

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150 567

Warren Springer v. Ernst Puttkammer.

1. *INSOLVENCY—Evidence of.*—To sustain an allegation of insolvency of the maker of a promissory note it is competent to put in evidence executions against him in favor of other parties returned by the sheriff unsatisfied, covering the time in question.

2. **EXECUTION**—*Meaning of a Return Unsatisfied.*—A return of an execution unsatisfied means that the defendant has no property which the sheriff can levy upon, and is evidence of the defendant's condition for the whole of the time the sheriff held the execution.

Assumpsit, against the indorser of a promissory note. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1895. Affirmed. Opinion filed June 8, 1895.

WM. J. AMMEN, attorney for appellant.

It is contended that the burden is on the plaintiff to show, not only that such insolvency existed at the time the note matured, but also to show that such insolvency continued until the commencement of the suit. Execution returned *nulla bona* a year before, does not show such insolvency. Baer v. Lichten, 24 Ill. App. 311; Shufeldt v. Sutphen, 52 Ill. 255; Kelly v. Graves, 74 Ill. 423.

If, at the time the note falls due, a suit against the maker would be unavailing, the holder may proceed at once against the assignor; but if he does not do this, in order to fix the liability of the assignor, he must show that a suit against the maker at any time while he held the note, after its maturity, would have been unavailing. Bledsoe v. Graves, 4 Scam. 383.

Return of executions *nulla bona*, in other cases, against the same party who executed the note, is admissible as tending to prove insolvency at that date, and raises a presumption of insolvency at the date of such return; but, of course, raises no presumption of insolvency at an earlier date; nor does it raise presumption of a continuance of insolvency permanently after such date. Philips v. Webster, 85 Ill. 146.

STEIN & PLATT, attorneys for appellee.

It is contended that the return of the sheriff of an execution unsatisfied against the maker of a note, is competent evidence to prove the insolvency of such maker in an action

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against an indorser. *Phillips v. Webster*, 85 Ill. 146; *Terry v. Tubman*, 92 U. S. 156; *Yates v. Hoffman*, 5 Hun 113; *Reynolds v. Pharr*, 9 Ala. 560.

It is sufficient to show that ordinary means to collect an execution would have been unavailing. The plaintiff is not obliged to negative the possibility of obtaining money by garnishment or by speculation in mortgaged property. *Pierce v. Short*, 14 Ill. 144.

A condition of insolvency once shown is presumed to continue until some change is shown. *Wait on Insolvent Corp.*, Sec. 33 and cases cited.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant as indorser of several promissory notes which fell due in July, 1893, alleging, in effect, the total and continued insolvency of the maker when the notes respectively fell due, and thereafter up to the time this suit was commenced.

To prove his allegation the appellee put in evidence several executions in favor of other parties, which were delivered to the sheriff in June, 1893, and returned no part satisfied in September, 1893. Also other executions which were in the hands of the sheriff most of the time between the return of the first and the commencement of this suit, with like returns.

A return of an execution unsatisfied, means that the defendant has no property which the sheriff can levy upon; it is sufficient to ground a judgment creditor's bill upon. *R. S.*, Sec. 49, Ch. 22.

The return being evidence of the fact, it matters not in whose favor was the execution, nor whether there was a judgment upon which it issued. The return is evidence because of a legal presumption that the sheriff did his duty upon process in his hands. He was not required to look behind the process for his authority to take the property of the defendant in execution, if any he had upon which a levy could be made. And as any real estate or personal property of the defendant could be levied upon immediately

when the execution came to, and all the time it was in the sheriff's hands, the return is evidence of the condition of the defendant for the whole time the sheriff held the execution.

There being this absolute—not being contradicted—proof of insolvency as to the most of the time in question, presumption supplied the rest.

The court was right in instructing the jury to find for the appellee, and the judgment is affirmed.

RULES OF PRACTICE
OF THE
APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT.

WITH AMENDMENTS TO DATE OF PUBLICATION.

JUNE 1ST, 1895.

Order of Court.—It is hereby ordered that all the rules of practice heretofore adopted and established by this court be and the same are hereby set aside, annulled and vacated; and that the following rules, be, and they are, hereby adopted, ordered and established for the regulation of the practice and proceeding of this court, and for the keeping of the dockets and records thereof; and it is ordered that said rules be entered of record by the clerk of this court.

RULE 1. Writs of Error and Supersedeas.—No supersedeas will be granted unless a transcript of the record on which the application is made be complete, and so certified by the clerk of the court below, and the requisite bond be entered into and filed in the office of the clerk of this court, according to law, with an assignment of errors written on or appended to the record. And on every application for a supersedeas, an abstract of the record, with a brief containing the points and authorities relied upon, and pointing specifically to those portions of the record upon which the alleged errors arise, with the record, shall be presented to the court or judge to whom the application is made. Every such application, whether made in open court or to a justice

in vacation, must be accompanied by an affidavit of the proposed securities, or some other credible person, justifying the sufficiency of bail, sworn to and properly certified.

RULE 2. Bond.—Whenever a bond is executed by an attorney in fact, the clerk shall require the original power of attorney to be filed in his office, unless it shall appear that the power of attorney contains other powers than the mere power to execute the bond in question, in which case the original power of attorney shall be presented to the clerk, and a true copy thereof filed, certified by the clerk to be a true copy of the original.

RULE 3. Form of Writ When a Supersedeas.—When a writ of error shall be made a supersedeas, the clerk shall indorse upon said writ the following words: “This writ of error is made a supersedeas, and is to be obeyed accordingly,” and he shall thereupon file a writ of error, with a transcript of the record, in his office. Said transcript shall be taken and considered as a due return to said writ, and thereupon it shall be the duty of the clerk to issue a certificate, in substance as follows, to wit:

STATE OF ILLINOIS, } ss.

OFFICE OF THE CLERK OF THE APPELLATE COURT }
OF THE FIRST DISTRICT. }

I do hereby certify that a writ of error has been issued from this court for the reversal of a judgment obtained by.....v..... in the.....Court of....., at the.....term, A. D. 18.., in a certain action of....., which writ of error is made a supersedeas, and is to operate as a suspension of the execution of the judgment, and as such, is to be obeyed by all concerned.

Given under my hand and the seal of the Appellate Court of the First District, at.....this.....day of....., A. D. 18...
....., Clerk.

RULE 4. To Whom Directed.—Writs of error shall be directed to the clerk or keeper of the record of the court in which the judgment or decree complained of is entered, commanding him to certify a correct transcript of the record to this court; but where the plaintiff in error shall file in the office of the clerk of this court a transcript of the record, duly certified to be full and complete, before a writ of error issues, it shall not be necessary to send such writ to

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the clerk of the inferior court, but such transcript shall be taken and considered as a due return to said writ.

RULE 5. Process—Writs of Error.—The process on writs of error shall be a *scire facias* to hear errors, issued on the application of the plaintiff in error to the clerk, directed to the sheriff or other officer of the proper county, commanding him to summon the defendant in error to appear in court, and show cause, if any he have, why the judgment or decree mentioned in the writ of error shall not be reversed. If the *scire facias* be not returned executed, an *alias* and *pluries* may issue without an order of court.

RULE 6. Return Day.—The first day of each term shall be return day, for the return of process; and no party shall be compelled to answer or prepare for hearing, unless the *scire facias* shall have been served ten days before the return day thereof; nor shall a defendant be at liberty to enter his appearance and compel the plaintiff to proceed with the cause, unless he shall have given the plaintiff ten days' notice before the term of his intention to enter his appearance and have the cause proceed to a hearing.

RULE 7. Scire Facias to Hear Errors—Notice—Continuance.—In all cases in which a writ of error is made a supersedeas, the plaintiff in error shall, on filing the record with the clerk, at the same time order and direct a *scire facias* to issue to hear errors, and shall use reasonable diligence to have the same served ten days before the first day of the term to which the writ of error is made returnable; on failing to do so, the defendant in error shall have the right to a hearing at the said term, after joining in error, without giving ten days' notice, as required by rule 6: *Provided*, if there be not ten days between the allowance of the supersedeas and the sitting of the court, the cause shall stand continued until the next term, unless by consent of parties it shall be otherwise ordered.

RULE 8. Notice to Purchasers and Terre-tenants.—In all cases wherein guardians, executors or administrators, or others acting in a fiduciary capacity, having obtained an

order or decree for the sale of lands in causes *ex parte*, and a sale has been had under such decree or order, and the same shall be brought to this court for revision, the purchaser or *terre-tenants* of such lands, if known, shall be suggested to the court by affidavit of plaintiff in error, and notice given them of the pendency of the writ of error, ten days before the first day of the term of the court to which the writ of error is returnable, so that said *terre-tenants* may appear and defend.

RULE 9. Records from Courts Below—How Prepared.
—Hereafter, in cases of appeal and of error in making up “an authenticated copy of the record of the judgment appealed from,” or in sending up a transcript of the record to this court as a return to a writ of error, the clerk of the court from which such appeal or writ of error is prosecuted shall certify to this court, first, a copy of the process and return; second, the pleadings of the parties, respectively; third, the verdict in jury trials; fourth, the judgment of the court below, whether tried by the court or jury; fifth, all orders in the same cause made by the court; sixth, the bill of exceptions; and seventh, the appeal bond in cases of appeal. And in no case shall the said clerk insert in such transcript any affidavit, account, or other document or writing, or other matter which by law constitutes no part of the record of a cause. This rule shall not extend to appeals or writs of error in chancery or criminal causes.

RULE 10. Assignment of Record by Clerk—Costs.
The clerk of the court below shall arrange the several parts of the record aforesaid, according to their chronological order. The clerk of this court shall not tax as costs in this court any matter inserted in such transcript contrary to the last preceding rule.

RULE 11. Time for Filing Records—Hearing Docket.
—No case brought to this court by appeal shall be placed on the court docket for hearing, unless the record is filed within the time now prescribed by law, or within the further time allowed by the court for filing the record; except, in extraordinary cases, the court, upon special application, may order a cause to be placed on the hearing docket.

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RULE 12. Time for Filing Records in Writs of Error.

—No case which may be brought to this court on writ of error shall be placed on the court docket for hearing, unless the record shall be filed on or before the second day of the term, or within such further time as may be allowed by the court for filing the same, except, in extraordinary cases, the court, upon special application, may order a cause to be placed on the hearing docket.

RULE 13. Removing Records.—No person shall remove from the office of the clerk any record of this court, except upon special leave granted for that purpose. No record shall be taken from the files of the court, except upon application therefor to the clerk or his deputy; and it is made the duty of the clerk to report promptly to the court every violation of this rule. The clerk shall be held responsible for the safe-keeping and production of the records. Application for leave to remove records may be considered at any time, in the discretion of the court.

RULE 14. Assignments of Error.—The appellant or plaintiff in error shall, in all cases, assign errors at the time of filing his record in this court, and on failing to do so, the case may be dismissed; but other errors may be assigned after the filing of the record, by leave of the court. The appellee or defendant in error shall have the right to assign cross-errors for two days after the expiration of the time within which the record is required by law to be filed in this court, and not afterward, without special leave of the court. The assignment of errors and cross-error must be written upon or attached to the record.

RULE 15. Motions.—Court will convene Mondays and Thursdays, and motions may be made at the opening of court each day, immediately after the decisions of the court are announced; but at no other time, unless in case of necessity, or in relation to a cause when called in course. Motions for orders of course will be entered by the clerk, with orders of course made thereon, viz., for hearing, taking under advisement, and entering decision in such manner that a perfect record may be kept of each step in the cause.

RULE 16. Special Motions—Objections.—All special motions shall be in writing and filed with the clerk, together with the reasons in support thereof; and a copy of said motion, and also of the affidavits on which the same is founded, shall be served on the opposite party or his attorney, at least one day before they shall be submitted to the court. Objections to motions must also be in writing.

RULE 17. When to be Supported by Affidavit.—When a motion is intended to be based on matters which do not appear by the record, the facts must be disclosed and supported by affidavit.

RULE 18. Security for Costs.—Upon filing an affidavit that any plaintiff in error is not a resident of this State, and that no bond for costs has been filed, a rule will be entered against him, of which he shall take notice, to show cause why the writ shall not be dismissed.

RULE 19. Abstracts.—In all cases, a party bringing a cause into this court shall furnish a complete abstract or abridgment of the record, therein referring to the appropriate pages of the record by numerals on the margin, and shall cause such abstract to be printed in a neat and workmanlike manner, with small pica type, and leaded lines, and it shall be sufficient to cause such abstract to be printed on both sides of the paper, with the same measure and margins as the volumes of Bradwell's Reports, and folded and bound in pamphlet form. Six copies of said printed abstracts shall be filed in each case, one for each of the justices, one for the defendant in error, and one for the court reporter, and one to remain on file with the record.

RULE 20. Further Abstracts.—The defendant's counsel shall be permitted, if he is not satisfied with the abstract or abridgment furnished by the plaintiff's counsel, to file and to furnish each of the justices of this court with such further abstracts as he shall deem necessary to a full understanding of the merits of the cause.

RULE 21. Briefs.—Printed briefs will be required in all causes, whether argued orally in full, or in part only, or when submitted on briefs without oral argument. The

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briefs required should contain a short, clear statement of the points, and the authorities in support thereof; and in citing cases from published reports, counsel will be required not only to give the book and page, but also the names of the parties as they appear in the title of the reported case; and the names of counsel filing brief or abstract must appear to the same. But the filing of a printed brief shall not preclude the party from filing full printed or written arguments in support of his brief of points and authorities, provided he does so within the time his printed brief is required to be filed.

RULE 22. Number of Copies.—Six copies of the briefs must be filed in each case—one for each of the justices, one for the opposite party, one for the court reporter and one to be filed with the record.

RULE 23. Docketing and Hearing.—Causes in which the people are a party, and in which they have a direct interest in the decision, shall be placed at the head of the docket; all other cases shall be docketed and called for argument in the order in which the records shall have been filed with the clerk.

RULE 24. Call of Docket—Expiration of Rules.—The docket shall be called numerically, and the causes shall be argued, continued, or otherwise disposed of, as they are called, unless for good cause shown, they be placed at the foot of the docket; but not more than twenty cases shall be called on any one day. Stipulations of parties or their attorneys to place causes at the foot of the docket, or otherwise changing the order in which causes are to be called, will not be recognized. All unexpired rules will terminate upon the call of the cause for hearing: *Provided*, that if the court shall give time to either party, without the consent of the other, the cause shall not lose its precedence on the docket.

RULE 25. Time of Filing Abstracts and Briefs.—In all cases where the record shall have been filed with the clerk not less than twenty days before the first day of the term, including all causes continued from a former term,

the plaintiff in error or appellant shall file with the clerk his abstract and brief at least five days before the first day of the term; and in all other causes down to and including number sixty on the term docket, the plaintiff in error or appellant shall file his abstract and brief on or before the second day of the term; and in all cases from number sixty-one to eighty inclusive, on or before the first Monday of the term; and in all cases from number eighty-one to number one hundred inclusive, on or before the second Monday of the term; and in all cases from number one hundred and one to and including one hundred and twenty, on or before the third Monday of the term; and in all other cases on or before the fourth Monday of the term. In case of the failure of the plaintiff in error or appellant to file both his abstract and brief within the time above limited, the appeal or writ of error will be dismissed, either on motion, on notice before, or without notice, on the call of the docket, unless the delay is excused upon circumstances to be shown. (See Rule 34.)

In all cases the appellee or defendant in error shall file his brief at least two days before the day the same is called for hearing, and also within not exceeding ten days after the expiration of the time limited in this rule for the filing of briefs by the appellant or plaintiff in error.

RULE 26. Oral Argument.—Oral arguments will be heard on the calling of a cause upon the regular call of the docket on behalf of the appellant or plaintiff in error, if he shall have complied with the rule in regard to filing printed abstract and brief; and on behalf of the appellee or defendant in error, if he shall have filed his printed brief on or before the day preceding the day of the calling of the cause. Printed or written arguments on behalf of either party, in addition to the brief, will not be received, unless the same shall have been filed within the time prescribed by these rules for the filing of printed briefs by such party, except that the appellant or plaintiff in error shall be at liberty to file a written or printed reply at any time before the argument of the case is commenced.

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RULE 27. Time for Argument.—The time allowed for each oral argument upon the hearing of a cause shall be restricted to one hour, except the closing argument, which shall be restricted to thirty minutes, unless otherwise specially permitted. Oral arguments will not be heard upon any motion, unless specially directed by the court. If the appellant or plaintiff in error makes no opening argument, the appellee or defendant in error will be allowed but fifteen minutes.

RULE 28. Damages on Dismissing Appeals.—When appeals from decrees, judgments or orders for the recovery of money are dismissed by this court for want of prosecution, or for failing to file authenticated copies of records, as required by law, the court will award damages against the appellant upon the amount recovered in the court below, not exceeding ten per cent on the first \$100, and five per cent on any excess.

RULE 29. Rehearing—Time and Manner of Application.—Application for a rehearing of any cause shall be made by petition to the court, signed by counsel, stating the grounds for a rehearing, and the authorities relied on in support thereof. Within ten days after a decision is entered of record, the party desiring a rehearing shall give notice in writing to the opposite party or his attorney, of his intention to make such application, and shall, within said ten days, file with the clerk of this court a copy of such notice, with proof of the due service thereof, and within said ten days he shall also file with the clerk six printed copies of the petition for a rehearing. Application for a rehearing will be entertained in that class of cases only in which the decision of this court can not be reviewed by the Supreme Court. If a rehearing be granted, the case will be reconsidered upon the record, abstracts, original briefs, petition, and any answer thereto, of which six printed copies shall have been filed with the clerk of the court within ten days after the order granting a rehearing is entered of record.

RULE 30. Rehearing—Supersedeas—Stay of Proceedings.—Any two of the justices of this court may, in vaca-

tion, issue an order which shall operate as a supersedeas in any case which has been submitted to this court for hearing and judgment, whenever a re-argument of the same shall, in their opinion, be advisable.

RULE 31. When Petition for Rehearing Filed in Vacation.—Whenever a petition for a rehearing shall be presented to either of the justices of this court in vacation, if he shall certify that there are probable grounds for granting a rehearing, all further proceedings authorized by the judgment of this court shall be stayed until the next term of the court.

RULE 32. Abstracts—Taxed as Costs.—Upon printed abstracts being furnished in conformity to the rules of this court, it shall be the duty of the clerk to tax a printer's fee, at the rate of twenty cents for each one hundred words of one copy of such abstract, against the unsuccessful party not furnishing such abstracts, as costs to be recovered by the successful party furnishing the same.

RULE 33. Appellate Court Library.—The books of the law library of this court shall not be marked or underlined with pen or pencil; nor shall the pages of the same be folded down; and no books shall be taken from the conference room without the consent of the court being first obtained for that purpose. Any violation of this rule will be considered as a contempt of court, and the person offending may be fined therefor at the discretion of the court.

RULE 34. Extending Time for Filing Abstracts and Briefs.—*Ordered*, that no extension of time in which to file abstracts or briefs will be granted, except upon written stipulation of the parties, or upon notice to the opposite party, and consideration by the court of circumstances shown by affidavit, of which a copy has been served with the notice.

RULE 35. Examination of Law Students.—Examination of applicants for license to practice law in this State shall be held in open court on the first Friday of each term. All application papers must be filed on or before the first Thursday of each term.

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RULE 36. Examinations for Admission to the Bar.—Each applicant shall present to the court his affidavit that he is over twenty-one years of age, a citizen of the United States and a resident of the State of Illinois, and that he has not applied or been examined for a license within six months preceding. He shall also present his own affidavit and the certificate of a licensed lawyer, or firm of lawyers, setting forth that he has pursued, for the period of two years, the same course of law studies prescribed for students in any of the regularly established law schools of this State, or a course of law studies equivalent thereto, naming the books studied, under the direction and supervision of such licensed lawyer, or firm of lawyers, and submitted to satisfactory examinations by such licensed lawyer, or firm of lawyers, at convenient intervals during such period of study, covering progressively the entire course studied: *Provided, however,* that the time employed as a law student at any law school shall be considered as a part of the two years, of which the court shall be satisfied by the affidavit of such student and the certificate of one of the professors of the law school.

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